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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 485

FIRST METHODIST CHURCH OF SAN LEANDRO, a California Corporation,
Appellant,

vs.

RUSSELL C. HORSTMANN, as Assessor of the County of Alameda, State of California; COUNTY OF ALAMEDA, CALIFORNIA; CITY OF SAN LEANDRO, CALIFORNIA; and EDWIN MEESE, JR., as Tax Collector of the County of Alameda,
Appellees.

FIRST UNITARIAN CHURCH OF BERKELEY, a California Corporation,
Appellant,

vs.

RUSSELL C. HORSTMANN, as Assessor of the County of Alameda, State of California; EDWIN MEESE, JR., as Tax Collector of the County of Alameda; COUNTY OF ALAMEDA; JAMES H. BRIGGS, as Assessor of the City of Berkeley, State of California; FRED A. BIRD, as Tax Collector of the City of Berkeley; and CITY OF BERKELEY,
Appellees.

On Appeal from the Supreme Court of the State of California

Jurisdictional Statement

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Appellees.

On Appeal from the Supreme Court of the State of California.

Jurisdictional Statement

Appellants appeal from the judgment of the Supreme Court of the State of California, entered April 24, 1957, and respectfully submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of the State of California, two dissents, is reported in the Advance California Reports, the official advance sheets of the Supreme Court of the State of California, at 48 A.C. 470. It is also unofficially reported at 311 P.2d 542. Page references hereinafter made are as found in the Appendix.

Appended to this Statement is a copy of this opinion and judgment and the opinion and judgment by the same court on the same day in a companion case, *First Unitarian Church v. County of Los Angeles,* 48 A.C. 417 (Appendix 4), to which reference will be necessary to ascertain the grounds of the judgment here appealed. The dissents commence at 48 A.C. 440 (App. 30) (Traynor, J., and Gibson, C.J.) and 447 (Carter, J.) (App. 40).

JURISDICTION

The proceedings were actions to recover taxes paid under protest and for declaratory relief, and were brought pursuant to the appropriate California statutes, Revenue & Taxation Code § 5138, Stats. 1941, c. 663, and Code of Civil Procedure § 1060, Stats. 1921, c. 463. Judgment was entered April 24, 1957, Notice of Appeal was filed with the Supreme Court of the State of California on May 27, 1957, and an enlargement of time until September 24, 1957, was granted by the Chief Justice of that Court and filed therewith July 10, 1957.

Jurisdiction of this appeal is conferred upon the Supreme Court by Title 28, United States Code, Section 1257(2). Cases sustaining the jurisdiction are *Atchison T. & S. F. Ry. Co. v. Public U. Commission* (1953), 346 U.S. 346, 74 S. Ct. 92, and *Standard Oil Co. of California v. Johnson* (1942), 316 U.S. 481, 62 S. Ct. 1168.

STATUTES INVOLVED

The validity of the following state statutes is involved:

1. *California Constitution*, Article XX, Section 19:

"Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or

"(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

"The Legislature shall enact such laws as may be necessary to enforce the provisions of this section."

2. *Revenue & Taxation Code*, Section 32, Stats. 1953, c. 1503:

"Any statement, return or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such a declaration, the person or organization making such statement, return, or

other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution."

QUESTIONS PRESENTED

1. Whether Section 19, Article XX of the Constitution of the State of California, which denies any tax exemption to advocates of the overthrow of the government of the United States or the State by force, violence, or unlawful means and to advocates of the support of a foreign government against the United States in the event of hostilities, and Section 32 of the Revenue and Taxation Code of California which requires all applicants (organizational or individual) for property tax exemptions (with the exception of applicants for the householders exemption) to sign a declaration that they do not advocate the proscribed doctrines, on their faces and as construed and as applied, are unconstitutional in violating the due process clause of the Fourteenth Amendment and through it, the First Amendment to the United States Constitution, in abridging freedom of speech, assembly and religion in the following manner and respects:

a) In infringing on these freedoms while bearing no reasonable relationship to the evil sought to be controlled by the enactments nor any reasonable relationship to the public welfare;

b) In infringing on these freedoms without any showing of a clear and present danger existing by reason of the receipt of tax exemptions by advocates of the proscribed doctrines or those who, for reason of conscience, refuse to sign a declaration that they do not advocate the proscribed doctrines;

c) In abridging these freedoms by imposing a prior restraint in that the language of the acts is vague and uncertain in its terms;

d) In violating the principle of separation of church and state and infringing on freedom of religion by using the indirect means of a denial of a tax exemption as a method of limiting churches in their right to make moral judgments about the state.

2. Whether the aforestated enactments, as written, construed and applied, deprive Appellants of their liberty and property without trial or hearing, accusation, confrontation, right to confrontation, right to cross-examination or the assistance of counsel, subvert the presumption of innocence and alter the rules of evidence and attaint Appellants by legislative fiat, all in violation of the due process clause of the Fourteenth Amendment and the provision of Article I, Section 9, Clause 3 of the Constitution of the United States.

3. Whether the said enactments as written, construed and as applied are unconstitutional in violating the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in imposing an unconstitutional condition upon the enjoyment of a privilege in requiring relinquishment of the right to freedom of speech, assembly and religion as a condition for receiving a tax exemption.

4. Whether the said enactments, as written, construed and applied, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution in discriminatorily denying tax exemptions to Appellants while granting them to others in similar circumstances.

5. Whether the said enactments violate the privileges and immunities clause of the Fourteenth Amendment of the United States Constitution.

6. Whether the said enactments, as written, construed and applied, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution in unreasonably and discriminatorily requiring a declaration of non-advocacy of the proscribed doctrines only for certain property tax exemptions and the corporate income tax exemptions but not for the householders and all other tax exemptions.

7. Whether the said enactments, as written, construed and as applied, regulate and restrict sedition, a subject-matter entirely within the cognizance and province of the federal government under the Constitution of the United States, and as to which subject-matter the Congress of the United States, by legislative enactments, has preempted and wholly occupied the field.

STATEMENT

Appellants' suits were consolidated by the trial court for judgment, were consolidated on appeal in the state court, and, as they involve identical questions, are so presented here. The facts are not in dispute. (App. 1, 2.) Appellants are churches which for many years have been duly organized and incorporated as such under the laws of the State of California. Each owns real property upon which are situated church buildings used for religious worship. Appellees, municipalities and taxing authorities, denied Appellants the exemption from property taxation allowed them as churches pursuant to Section 1½, Article XIII of the California Constitution. It is conceded that Appellants are in all respects qualified for and entitled to the exemption with the single alleged exception that each church in applying for the exemption did not state, as required by the statute and the form furnished, "that the applicant does not

advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in the event of hostilities."

It is further conceded that after this denial of tax exemption Appellants duly paid under protest the tax assessed and filed a suit for its recovery (and declaratory relief), all as provided by state law.

At no stage in the proceedings has it been even contended, much less has any evidence been adduced, that Appellants advocate the overthrow of the governments of the United States or California by force or violence, or otherwise, or are in any way disloyal. Rather, the sole reason for Appellant churches' refusal to sign the nonsubversive oath, and the consequent loss of the exemption, was their strong belief that its exaction violated fundamental constitutional rights with respect to freedom of speech, freedom of religion and due process.

That the federal questions sought to be reviewed were raised is abundantly clear in the companion case, to which reference has already been made. See *First Unitarian Church v. County of Los Angeles* (App. 4, especially 6, 11, 17-29). That the contentions of these Appellants that the statutes were repugnant to the United States Constitution were discussed and disposed of adversely to Appellants is indicated below in the opinion in Appellants' cases (App. 1-3). The rule is well settled that the recognition by the state court that a federal question is raised is sufficient and that the Supreme Court will not inquire further into the time and method of its raising. *Charleston Federal S. & L. Ass'n v. Alderson* (1945), 324 U.S. 182, 65 S. Ct. 624. If the reference to the companion case is not sufficiently explicit,

the record which has been filed herewith demonstrates that the federal constitutional questions here presented were raised both at trial and on appeal.

Each Appellant's complaint specifically and in detail alleged the impairment and violation of rights protected by the First and Fourteenth Amendments to the Constitution (R. 7, 27 and 53).

The statements filed with the application for tax exemption and filed with the tax payments as protest thereof are referred to in the record and show the federal questions were raised even before suit was filed (R. 24, 31, 53). Specific reference to the federal questions here presented are also found in the trial court's findings of fact (R. 77, 85), conclusions of law (R. 88, 89), and judgment (R. 94-96). The trial court in each case adjudged the state statutes to be invalid as repugnant to the Constitution of the United States.

On the appeal to the California Supreme Court from the trial court, wherein the trial court's judgment was reversed, the Supreme Court expressly noted the federal questions had been raised in a companion case and declared it was controlling as to Appellants' cause and contentions (App. 2, 3). It may be added that the federal questions were presented on appeal as provided for by the California procedure, namely, by being set forth in the written briefs of the respective parties. Additionally, the federal questions were argued orally.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

These consolidated cases drew in question the validity of statutes of the State of California on the ground of their being repugnant to the Constitution. The final decision was in favor of their validity. The cases are, therefore, within

the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction.

The federal questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. All too apparent is "the public importance of this type of legislation and the recurring serious constitutional questions which it presents." *Wieman v. Updegraff* (1952), 344 U.S. 183, 186, 73 S. Ct. 215, 216; *Konigsberg v. State Bar of California* (1957), 354 U.S. ....., 77 S. Ct. 722, 723.

In weighing the substantial character of these questions, it is significant that in order for the California Supreme Court to find these statutes valid it was necessary to reverse seven of the nine trial court judges passing on this question. Even after the 4-3 decision of the California Supreme Court, the number of state court judges finding the statutes valid was six, whereas ten state judges had adjudged them invalid. Secondly, it appears that the substantiality of the questions presented is self-evident from a bare recital of the fundamental rights believed to be abridged: freedom of speech, freedom of religion, and due process of law.

An examination of the questions presented as previously listed in detail will make very apparent the substantiality and seriousness of what is here involved. These will not be repeated individually at this point, but a concise elaboration of the basic issues may be attempted.

1. Effect on Appellants as Churches.

Both the abridgement of their constitutional rights and the financial penalty imposed on them for claiming these rights have been particularly cruel in their effect upon Appellants because of the fact that they are churches. In the first place, forced conformance to the State's demand for an expurga-

tory declaration presses particularly hard on a house of worship dedicated to the inviolability of individual conscience. This coercion of thought and feeling destroys a deep religious value; it is all the more of a moral affront to a church that the required plea or oath is one of not guilty to certain criminal activities regarded as among the most serious, heinous and morally reprehensible. In the second place, the penalty imposed as the price for claiming constitutional rights is particularly harsh and severe on Appellants because they are churches. This state tax exemption to churches has been given for many years, not only because churches may be said to "deserve" it, i.e., because their moral influence is a social good deserving of recognition and encouragement, but also because churches generally need the exemption, i.e., churches are nonprofit organizations which commonly are "poor" in the sense that they do not accumulate material wealth and their income or donations barely meet the necessary costs of their religious works. Thus, an unprecedented exaction of a tax-penalty from a church places it in the position of having to choose between submitting to a violation of its religious integrity or pursuing a course that may be financially ruinous.

That the particular status and character of these Appellants as churches makes especially substantial the questions here presented is emphasized by the fact that they, in effect, are representing thousands of other churches whose fate will be decided by this appeal. This should not divert, however, from the fact that when this Court protects the constitutional rights of any individual or group, all citizens of this country are thereby enriched. Furthermore, while these particular appellants come before the Court because of religious motives, many citizens who do not necessarily share in Appellants' religious views are likewise concerned

by the issue and, as to them, this Court may well wish to decide on the broader issue that there is no power to exact the oath. If such were this Court's course, the decision need not be confined to finding whether there is a religious infringement. Such was the situation in *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 634, 635, 63 S. Ct. 1178, 1183, 1184.

It is true that of necessity even such fundamental freedoms as those of religion or speech are not absolute. Certainly religious faith does not free one from the responsibility of obedience to the law. *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 643, 63 S. Ct. 1178, 1188. But it is equally true that there is a "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." (*Thomas v. Collins* (1945), 323 U.S. 516, 530, 65 S. Ct. 315, 322), and that for there to be a valid abridgement of a constitutional right there must be an important reason. This has been variously expressed as requiring a clear and present danger to be present, which test has been reexamined and reiterated by this Court over the years, or by requiring that the means utilized must bear some reasonable relation to the evil sought to be corrected or avoided. The statutes in question do not meet this test and, indeed, these cases arising under this legislation may represent some of the most unwarranted abridgements of fundamental constitutional rights ever to come before this Court because of the complete lack of any demonstrated danger or evil which reasonably might be reached by the oath or the tax-penalty.

2. This Court's Standard Misconceived.

Clearly a most serious aspect of these cases which this Court should consider is that the majority opinion of the

California Supreme Court, as pointed out by both of the dissents therefrom, has apparently misconceived the meaning and effect of *Dennis v. United States* (1950), 341 U.S. 494, 71 S. Ct. 857, in that it suggests that this Court has repudiated and abandoned the "clear and present danger" test. (See App. 33, 34, 38-40 (Traynor, J., and Gibson, C.J.) and 62-66 (Carter, J.)). That this conclusion is unwarranted was made quite clear in the Court's recent explanation of *Dennis* in *Yates v. U.S.* (1957), 354 U.S. ....., 77 S. Ct. 1064. In the light of this more recent statement, it is clear that before basic constitutional liberties may be infringed upon there must exist some danger or threat requiring the infringement. To have the Supreme Court of the State of California in apparent disagreement with such a statement certainly raises a federal question of the most substantial nature.

While it should be stated that the majority below made mention of the necessity of balancing conflicting interests, the clear tenor of that opinion compels the conclusion that the majority felt that this Court's traditional requirement, epitomized by the clear and present danger standard, was a thing of the past (see App. 23-26). Whether or not there was a sufficiently express abandonment of this Court's requirement, it appears such was necessarily implied in the judgment because of the conceded fact that these Appellants present no threat or danger whatsoever to the State of California or to the United States of America. Not only has there been no proof or even contention made that these churches are in any way disloyal, but the majority opinion rests its decision on the assumed fact of the non-existence of subversion (App. 29). It further states that "such advocacy from whatever source poses a threat to our government * * *" (App. 26). Thus, either it is decided that this

infringement of constitutional rights and imposition of the tax-penalty may be accomplished as to churches (and others) posing no threat or danger whatsoever, or in the alternative it is "baldly assumed that plaintiff church advocates the overthrow of the Government by force because it refuses to declare that it does not" (App. 34 (dissent)). If the latter is the case, this state court has again attempted to draw unfavorable inferences from a refusal to answer which was based on a belief that the United States Constitution prohibited the type of inquiry. This the state cannot do. *Konigsberg v. State Bar of California* (1957), 354 U.S. ....., 77 S. Ct. 722, 732.

This jettisoning of the clear and present danger test as obsolete can only be based on a misconception of the meaning of *Dennis* for, as this Court carefully pointed out in *Yates,* that case did not relegate to the past careful consideration of the challenged speech's "tendency to generate action." 354 U.S. ....., 77 S. Ct. 1064, 1077, 1078. Clearly applicable to this decision is the recent declaration of the Court "that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. There was nothing to connect the questioning of petitioner with this fundamental interest of the State * * *" *Sweezy v. State of New Hampshire* (1957), 354 U.S. ....., 77 S. Ct. 1203, 1212.

The suggestion that fundamental constitutional rights may be abridged where there is no danger or evil involved presents a substantial enough question to justify a resolution at this time for the guidance of the state and the federal courts in this all important area.

3. A Pressing Problem: the Right of Silence.

If a balancing of competing interests is one of the most substantial questions of a recurring nature which must be brought before this Court, certainly one of the most pressing problems awaiting resolution by this Court at this time is whether there is a right to remain silent when interrogated on matters of conscience and belief. A declaration of the principles here involved will have widespread consequence considering the present state of the law does not furnish adequate guidance to one wishing to keep his own counsel without raising the ground of self-incrimination. It appears that these cases are appropriate for an answer to the question previously left open by this Court as to whether a state may base a deprivation with grave consequences on the independent ground of mere failure to answer a question. *Konigsberg v. State Bar of California* (1957), 354 U.S. ....., 77 S. Ct. 722, 727, 732. Cited there by the Court were prior decisions indicating that a claim that the questions were improper was not frivolous. Among these is the landmark case, *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 633-636, 646, 63 S. Ct. 1178, 1183, 1184, 1189.

4. Loyalty Oath Cases Broadened.

The questions here involved are not clearly settled by prior decisions. This conclusion is compelled from a reading of the opinion of the majority in the California Supreme Court which stands for the proposition, apparently, that prior declarations of this Court upholding so-called loyalty oaths in a certain context either required or allowed judicial approval of loyalty oaths in any and all contexts or, at least, in this particular context (App. 26, 27). As a dissenting opinion clearly points out, loyalty oaths have been up-

held only where they were reasonably related to a legitimate objective, and not where they were for the purpose of restraining speech (App. 35, 36). A clarification of the issues here is imperative if carefully limited decisions involving public employment and the like are not to be broadened to those cases where no legitimate interest is being served and, rather, nothing more than a dragnet of belief is involved. Certainly, if these statutes as written, construed and applied are valid, then it would be perfectly valid for the State each year to exact an oath of all its citizens that they have not in the course of the last tax year committed any crimes. Very clearly we have here affected much more than "only a relative handful of persons." *American Communications Ass'n v. Douds* (1950), 339 U.S. 382, 404, 70 S. Ct. 674, 687.

5. Arbitrary and Discriminatory Taxation.

A full understanding of the arbitrary and discriminatory manner in which the tax classification here involved was made would require more elaboration than may be here made. Suffice to say, in the State of California, nearly every person or organization enjoys one or more exemptions from taxation. It follows, therefore, that the withholding of the tax exemption is equivalent to the imposition of a tax (see App. 30 (dissent)). Secondly, two deviations by this statute from the provisions of the section of the California Constitution forbidding to the proscribed advocates any exemption from any tax imposed by the state or any of its public agencies or divisions result in an inexplicable and irrational discrimination against these and similar institutions. The first expressly frees from the oath all householders, no doubt the most numerous group enjoying the property tax exemption. The second restricts the oath to those claiming property tax exemptions, ignoring those

claiming exemption from many other taxes, such as the personal income tax, the gasoline tax, etc. As a consequence, the tax-penalty devolves upon the least likely group, namely, those favored by the law to the extent that they have been granted a property tax exemption. Indeed, if there is no satisfactory answer to "why charitable institutions are singled out as presenting the greatest danger to this country in time of peace or war," then the contention that the statutes bringing about this bizarre but grave result must be invalid is likewise unanswerable (App. 58 (dissent)).

If "all" that is involved here is the denial of a tax exemption which need not be regarded too seriously since it imposes no criminal sanction and involves no right, then principles enunciated by this Court require direct application to these cases. *Sweezy v. State of New Hampshire* (1957), 354 U.S. ....., 77 S. Ct. 1203, 1210; *Konigsberg v. State Bar of California* (1957), 354 U.S. ....., 77 S. Ct. 722, 725; *Schware v. Board of Bar Examiners of State of N.M.* (1957), 354 U.S. ....., 77 S. Ct. 752, 756; *Wieman v. Updegraff* (1952), 344 U.S. 183, 190, 191, 73 S. Ct. 215, 218, 219. "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. * * * A state may not impose a charge for the enjoyment of a right granted by the federal constitution." And this is true whether the imposition is discriminatory or non-discriminatory. *Murdock v. Commonwealth of Pennsylvania* (1943), 319 U.S. 105, 112, 113, 118, 63 S. Ct. 870, 874, 875, 876. But, "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. State of Mississippi* (1928), 277 U.S. 218, 223, 48 S. Ct. 451, 453 (dissent).

Whether regarded as uncertain areas or merely settled principles which were not appreciated by the majority below, there are a number of questions of substance involved

in these cases. One question is whether this legislation, in demanding an expurgatory declaration as the price of tax exemption, does not subvert the presumption of innocence fundamental to American law and is not, therefore, unconstitutional and invalid. *Cummings v. Missouri* (1866), 4 Wall. (U.S.) 277. Of substantial concern is whether this type of legislation does not violate the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment.

6. An Unprecedented Incursion into Intent.

This Court over the years has settled innumerable questions arising as the result of persisting efforts to impinge upon rights and freedoms protected by the First Amendment. It has been necessary, furthermore, to apply the principles which have been so evolved case by case to succeeding cases which differed only in degree or detail from their predecessors. A portion of this statute, however, presents what is believed to be a completely unprecedented incursion into this area of the First Amendment, namely, a demand that one disclaim advocacy of the support of a foreign government against the United States in the event of hostilities.

A substantial question which is immediately apparent is whether this sort of requirement is not void for vagueness in being insufficiently precise and clear in stating what a person is forbidden to say. See *Winters v. New York* (1948), 333 U.S. 507, 68 S. Ct. 665. Of perhaps more basic importance is the question whether this admitted restriction on speech and thought is constitutionally justified or whether a balancing of the interests involved would not result in a determination that the alleged danger was too remote to warrant this invasion of thought and expression. A third

question of substantial nature in this regard is whether this legislation does not invade a field already occupied by the federal government, namely, provision relative to sedition or treason. See *Pennsylvania v. Nelson* (1956), 350 U.S. 497, 76 S. Ct. 477.

CONCLUSION

We believe that the questions here presented are of such public importance and substance, and the abridgements complained of are so severe and in such a vital area that they warrant the plenary consideration of this Court.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the Supreme Court of the State of California

S. F. No. 19,507

In Bank—April 24, 1957

First Methodist Church of San Leandro,
Respondent,

vs.

Russell C. Horstmann, as Assessor, etc., et al.,
Appellants.

First Unitarian Church of Berkeley (a Corporation),
Respondent,

vs.

Russell C. Horstmann, as Assessor, etc., et al.,
Appellants.

OPINION

SHENK, J.—This is an appeal by the defendants from judgment for the plaintiffs in two cases consolidated for trial and on appeal. They are actions in which the plaintiff churches seek to recover property taxes paid under protest and for declaratory relief to determine their claim that article XX, section 19 of the Constitution and section 32 of the Revenue and Taxation Code are unconstitutional.

It appears from a written stipulation of facts that the plaintiff First Methodist Church of San Leandro owns real property devoted solely and exclusively to religious purposes within the jurisdiction of and subject to taxation by the defendant city of San Leandro and the county of Alameda.

Other facts appear which would otherwise fulfill the requirements of section 1½ of article XIII of the Constitution providing for the exemption of such property from taxation. On March 16, 1954, an application for the exemption for the tax year 1954-1955 was filed in the office of the defendant assessor of the county of Alameda. The application was made on the form provided by the assessor, but the non subversive oath contained therein as required by section 19 of article XX of the Constitution and as implemented by section 32 of the Revenue and Taxation Code was stricken out and not included in the affidavit. The application was denied and the property assessed as other nonexempt property in the county and city. The plaintiff First Methodist Church paid, under protest, the first installment of its 1954-1955 taxes and brought its action to recover the same.

The cause commenced by the First Unitarian Church of Berkeley was submitted on the pleadings. It appears therefrom that this plaintiff owns real property devoted solely to religious purposes within the jurisdiction of and subject to taxation by the defendant city of Berkeley and county of Alameda. Facts are alleged which fulfill the requirements of article XIII, section 1½ of the Constitution for exemption from taxation, but in filing its application for the exemption the plaintiff struck out and refused to execute the oath contained in the application form provided by the assessor pursuant to article XX, section 19 of the Constitution and section 32 of the Revenue and Taxation Code. The application was denied. Taxes were assessed without benefit of the exemption and were paid by the plaintiff church under protest.

The judgment in the consolidated action declared section 19 of article XX of the Constitution and section 32 of the Revenue and Taxation Code to be invalid on numerous

grounds, and ordered a refund of taxes paid in the amounts stipulated in the protests filed with the payments.

The contentions asserted in support of the judgment have been discussed and disposed of adversely to the plaintiffs' contentions in the case of *First Unitarian Church of Los Angeles v. County of Los Angeles,* [..... P.2d .....]. It was held in that case that the oath could validly be required of churches as a condition to granting the tax exemption. That case is controlling here.

The judgment is reversed.

SCHAUER, J., SPENCE, J., and MCCOMB, J., concurred.

TRAYNOR, J., Dissenting.—For the reasons stated in my dissenting opinion in *First Unitarian Church of Los Angeles v. County of Los Angeles,* [..... P.2d .....], I would affirm the judgment.

GIBSON, C. J., concurred.

CARTER, J., Dissenting.—For the reasons stated in my dissenting opinion in *First Unitarian Church of Los Angeles v. County of Los Angeles,* [..... P.2d .....], I would affirm the judgment.

Appendix B

In the Supreme Court of the State of California

L.A. No. 23847

In Bank—April 24, 1957

First Unitarian Church of Los Angeles (a corporation),
Appellant,
vs.
County of Los Angeles et al.,
Respondents.

OPINION

SHENK, J.—This is an appeal from a judgment for the defendants following an order sustaining a general demurrer to the complaint without leave to amend.

The action was brought to recover taxes paid under protest and for declaratory relief. The plaintiff is a duly organized nonprofit religious organization with its principal office in the city of Los Angeles. It is the owner of real property devoted exclusively to religious purposes and located within the jurisdiction of, and subject to property taxation by, the county and city of Los Angeles. It presented to the assessor of Los Angeles County an application for the exemption of its property, particularly described, for the fiscal year 1954-1955. The application was denied by the assessor on the ground that the plaintiff had not qualified for an exemption because it had failed and refused to include in the application for exemption the nonsubversive

declarations required by section 32 of the Revenue and Taxation Code. The application was otherwise complete. Thereafter the real property of the plaintiff was assessed as property not exempt, and within the time prescribed by law the plaintiff paid the tax under protest and brought this action for the recovery of the sum so paid. The assessor refused to allow the exemption because of the provisions of section 19 of article XX of the Constitution[1] and section 32 of the Revenue and Taxation Code.[2]

Section 19 of article XX was adopted at the general election on November 4, 1952, and was placed as a new section in that article under the heading "Miscellaneous Subjects." The section reads:

"Section 19. Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or

"(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this state.

"The Legislature shall enact such laws as may be necessary to enforce the provisions of this section." (Stats. 1953.)

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[1]Hereinafter referred to as section 19 of article XX.

[2]This and all other code sections hereinafter referred to will be to sections of the Revenue and Taxation Code unless otherwise indicated.

Following the amendment to the Constitution section 32 was added to the Revenue and Taxation Code in 1953. It is as follows:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such a declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." (Stats. 1953, p. 3114.)

The plaintiff contends that both the constitutional provision and the code section are invalid. It is argued that the imposition and collection of taxes sought to be recovered and the denial of the church property tax exemption provided for in section 1½ of article XIII of the Constitution, as applied to the plaintiff church and all other churches similarly situated, was and is in violation of the provisions of the state and federal Constitutions which require reasonable and proper classifications for purposes of taxation and provide for freedom of religion, freedom of speech and the

protection of other rights specified in the protest a copy of which is attached to and made a part of the complaint. The provisions of the protest will be referred to later on in this opinion.

It is noted that section 19 of article XX does not specifically mention churches or any other organizations or individuals which are subject to its provisions. Its terms are general and apply to all owners of property as to which exemption from taxation might be claimed.

It is fundamental that the payment of taxes has been and is a uniform if not a universal demand of government, and that there is an obligation on the part of the owner of property to pay a tax legally assessed. An exemption from taxation is the exception and the unusual. To provide for it under the laws of this state requires constitutional or constitutionally authorized statutory authority. It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn. It may be granted with or without conditions but where reasonable conditions are imposed they must be complied with.

A church organization is in no different position initially than any other owner of property with reference to its obligations to assist in the support of government by the payment of taxes. Church organizations, however, throughout the history of the state, have been made special beneficiaries by way of exemptions. A brief reference to the constitutional and statutory background relating to this and other exemptions in this state will be made.

We find in the Constitution of 1849 the following provisions: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed proportion to its value, to be ascertained as directed by law. . . ." (Laws of California, 1850-1853, p. 57, art. XI, § 13.) No provision

for exemption from taxation is found in that Constitution. In 1853 the Legislature passed an act entitled "AN ACT *to provide Revenue for the Support of the Government of this State.*" (Laws of California, 1850-1853, p. 669.) In section 1 of article I it was provided that all land in the state owned or claimed by any person or corporation shall be listed for taxation. In section 2 of the same article it was provided that "The following property shall not be listed for taxation." Then follow several paragraphs where numerous classifications of property are named, such as publicly owned property, town halls, public squares, colleges, schoolhouses, public hospitals, asylums, poorhouses, cemeteries and graveyards. In paragraph 5 it was provided that the following also shall not be listed for taxation: "Churches, chapels, and other buildings for religious worship, with their furniture and equipments, and the lots of ground appurtenant thereto and used therewith, so long as the same shall be used for that purpose only." (Laws of California, 1850-1853, p. 671.)

This statutory method of providing for exemptions continued until the adoption of the Constitution of 1879. Section 1 of article XIII of the new Constitution required constitutional authority for exemptions. It was there provided that "All property in this State except as otherwise in this Constitution provided, . . . shall be taxed in proportion to its value, to be ascertained as provided by law. . . ." In subsequent sections of the same article the exemption of numerous classes of particularly described property is provided for. Section 1½ of article XIII provides for the church exemption as follows: "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship . . . shall be free from taxation. . . ."

In 1944 section 1e was added to article XIII which provides that "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes . . ." This provision did not have the effect of changing existing laws with reference to the exemption of church property except to authorize the Legislature to extend the exemption of that property as provided for in section 1½ of article XIII to its personal property. Whether that section is self-executing is of no concern for in 1903 the Legislature added section 3611 to the Political Code, repeating the constitutional language which exempted church real property and providing among other things that "any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building. . . ." (Stats. 1903, p. 21.) The reference in that section to property which "is listed for taxation" was in contemplation of section 8, article XIII of the Constitution, which has provided since 1879 that "The Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at 12 o'clock meridian, on the first Monday of March."

Section 3611 of the Political Code was carried in to the Revenue and Taxation Code in 1939 as section 254, which

provides that any "person claiming the church . . . exemption shall make a return of the property to the assessor annually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the" State Board of Equalization. The form prescribed by the State Board of Equalization includes the nonsubversive portion of the affidavit, which the plaintiff has refused to include in its return.

No meritorious argument has been or can be advanced to the effect that section 19 of article XX is not a valid enactment under state law or that it is inapplicable to the church property exemption provided for in section 1½ of article XIII. Section 19 of article XX was adopted in accordance with the procedures required by the Constitution for an amendment to that document by vote of the electors of this state. Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions. In direct terms it provides that no person or organization included in the proscribed class shall receive an exemption from any tax imposed by the state or any taxing agency of the state. It applies to all tax exemption claimants. Its prohibitions are declared by its own terms and are mandatory and prohibitory. (Const., art. I, § 22.) By its enactment the people of the state declared the public policy of withholding from the owners of property in this state who engage in the prohibited activities the benefits of tax exemption. The denounced activities are criminal offenses under state law (Stats. 1919, p. 281), and the act of Congress known as the Smith Act (54 Stat. 670) makes it unlawful to advocate the overthrow of the government by force and violence.

It may properly be said that the primary purpose of the people of the state in the enactment of section 19 of article

XX was to provide for the protection of the revenues of the state from impairment by those who would seek to destroy it by unlawful means. It contains no exceptions. It applies to churches when it provides that "Notwithstanding any other provisions of this Constitution" its prohibitions shall apply to all tax exemption claimants, and declares in effect that the tax revenues of the state shall not be depleted by those who would seek to destroy it in violation of the criminal laws of the state and the nation. It is clear that section 19 of article XX is a valid enactment under the Constitution of the state. That it was properly incorporated in the Constitution as a matter of state policy may not be questioned.

It is then to consider whether section 32 is a valid implementation of section 19 of article XX. Section 32 declares that "This section shall be construed so as to effectuate the purpose of Section 19 of article XX of the Constitution." Notwithstanding the fact that a particular provision may be self-executing, legislation enacted in aid thereof is not invalid. (*Chesney v. Byram*, 15 Cal. 2d 460, 463 [101 P.2d 1106].) The Code section declares within itself its purpose but that purpose is obvious without the declaration.

The plaintiff contends that section 32 is void for several reasons. First, because of the exception from its requirements of householders who are entitled to an exemption of $100 of assessed value of their personal property as provided for in section 10½ of article XIII of the Constitution. It is contended that this exception renders the section lacking in uniformity and thus provides for an unlawful classification of taxable property under the law. Secondly, that it violates the federal constitutional guarantees of separation of church and state and freedom of speech. The first contention will be considered in advance of the others for

the reason that it involves the application of the Constitution and laws of the state relating to taxation.

If it be assumed for the moment that section 32 is invalid for any of the reasons stated, still the plaintiff, under the general provisions of state law, is not relieved from its obligation otherwise to disclose the facts required by section 32. In this connection the powers and duties of the assessor and the obligations of the plaintiff as the owner of real and personal property must be considered in the light of state law. Those powers, duties and obligations are set forth generally in the Revenue and Taxation Code.

It is the duty of the assessor to see that all property within his jurisdiction is legally assessed and that exemptions are not improperly allowed. He is liable on his bond "for all taxes on property which is unassessed through his wilful failure or neglect." (§ 1361.) By section 441 it is provided in accordance with section 8 of article XIII of the Constitution that "Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p. m. on the last Monday in May, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or records for examination." For use by the assessor and the property owner the State Board of Equalization is required to prepare the forms of blanks for the property statement. (§ 452.) The assessor may subpoena and examine any person in relation to any statement furnished by him. (§ 454.) Any person who wilfully states to the assessor anything which he knows to be false, in any oral or written statement, even not under oath, but required or authorized to be made and relating to an assessment, is guilty of a misdemeanor. (§ 461.) Section 462 provides that every person is guilty of a

misdemeanor who, after proper demand by the assessor, refuses to give the assessor a list of his taxable property or "Refuses to swear to the list." By section 463 it is provided, among other things, that every person shall forfeit $100 to the people of the state, to be recovered by action brought in their name by the assessor, for each refusal to furnish the property statement or to fail to appear and testify when requested to do so by the assessor.

It thus appears that under the tax laws of the state wholly apart from section 32 it is the duty of the assessor to ascertain the facts with reference to the taxability or exemption from taxation of property within his judisdiction. And it is also the duty of the property owner to cooperate with the assessor and assist him in the ascertainment of these facts by declarations under oath.

With particualr reference to the many and various tax exemptions, the Revenue and Taxation Code provides for the ascertainment of the facts as a prerequisite for exemptions. Those facts in many instances must be made known to the assessor by the affidavit of the tax exemption claimant. They include, among others, veterans exemptions, church exemptions, welfare exemptions, college exemptions and orphanage exemptions. In the case of the church exemption the affidavit shall give "any information required" to carry the exemption into effect. (§ 254.) It is significant to note that nowhere in the law of the state is there a requirement for the property owner to make a showing for tax exemptions in the case of householders, cemeteries, game refuges and a few others. It thus appears that the Legislature in addition to the exception of householders from the requirements of section 32 has made no requirement otherwise for any showing on their part of their right to the exemption, either by affidavit or otherwise. If the exclusion of house-

holders from the requirement of section 32 renders that section void as discriminatory or lacking in uniformity it would seem to follow that the entire Revenue and Taxation Code with reference to procedures to qualify for exemptions would be void for the same reason. But obviously no such claim is made.

As stated it is the duty of the assessor to see that exemptions are not allowed contrary to law and this of course includes those which are contrary to the prohibitions provided for in section 19 of article XX. With the aid of section 32 his task is facilitated by the means therein supplied. Without that aid he is nevertheless required to ascertain the facts with reference to tax exemption claimants. Those facts may be disclosed in several different ways. In the instances in which he is without the assistance or cooperation of the tax exemption claimant and he is relegated to his own devices in discovering the facts he may do so by the examination under oath of the exemption claimant. (§ 454.) If he is satisfied from his investigations that the exemption should not be allowed he may assess the property as not exempt and if contested compel a determination of the facts in a suit to recover the tax paid under protest. In such a case it would be necessary for the claimant to allege and prove facts with reference to the nature, extent and character of the property which would justify the exemption and compliance with all valid regulations in the presentation and prosecution of the claim. In any event it is the duty of the assessor to ascertain the facts from any legal source available. In performing this task he is engaged in the assembly of facts which are to serve as a guide in arriving at his conclusion whether an exemption should or should not be allowed. That conclusion is in no wise a final determination that the claimant belongs to a class proscribed by section

19 of article XX or is guilty of any activity there denounced. The presumption of innocence available to all in criminal prosecutions does not in a case such as this relieve or prevent the assessor from making the investigation enjoined upon him by law to see that exemptions are not improperly allowed. His adminstrative determination is not binding on the tax exemption claimant but it is sufficient to authorize him to tax the property as nonexempt and to place the burden on the claimant to test the validity of his administrative determination in an action at law. For the obvious purpose, among others, of avoiding litigation, the Legislature, throughout the years has sought to relieve the assessor of the burden, on his own initiative and at the public expense, of ascertaining the facts with reference to tax exemption claimants. In addition to the means heretofore and otherwise provided by law the Legislature, with special reference to the implementation of section 19 of article XX, has enacted section 32. That section provides a direct, time saving and relatively inexpensive method of ascertaining the facts. The Legislature could take these factors into consideration. It could also take into account the fact that the segment of householders in this state is so overwhelmingly large as compared with others chosen for exemptions that the cost of processing them would justify their separate classification. Where any state of facts can be reasonably conceived which would sustain legislative classification the existence of those facts will be presumed. (*Lelande v. Lowery*, 26 Cal. 2d 224, 232-233 [157 P.2d 639, 175 A.L.R. 1109].) Furthermore, aside from the power of the Legislature to classify for the purpose of general legislation (see *Reclamation District v. Riley*, 192 Cal. 147, 156 [218 P. 762]; 24 Cal. Jur. 432) there is another and more conclusive reason why it may classify the personal property of house-

holders. Section 14 of article XIII of the Constitution was amended in 1933 to provide that the Legislature "shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property . . . may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property." Of this constitutional provision this court said in *Roehm v. County of Orange*, 32 Cal. 2d 280 at pages 283-284 [196 P.2d 550]: "Article XIII of the California Constitution as first adopted provided for a uniform property tax upon real and personal property alike. This requirement of uniform taxation of real and personal property, however, has been abandoned by subsequent amendments. Under these amendments the Legislature may classify personal property for purposes of taxation or exempt all personal property or any form, type, or class thereof," and on page 285 the court declared that this authorization to the Legislature to classify tangible personal property is "all inclusive" and covers "all forms" of tangible personal property. The personal property of the householders falls within the kind of personal property which the Legislature was constitutionally authorized to classify for purposes of taxation.

There is therefore no merit in the plaintiff's contention that the exception of householders from the requirements of section 32 renders that section invalid. There is likewise no merit in the contention that the section is invalid because of the failure of the Legislature to include within its requirements those who are entitled to exemptions under income tax laws and numerous other tax laws wherein certain exemptions are taken into consideration in arriving at the

amount of the tax to be paid. Those taxes are in categories which are subject to different treatment by separate classification. The Legislature is at liberty to select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation. (*Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 [75 S.Ct. 461, 99 L.Ed. 563], and cases there cited.) Section 32 applies to all exemption claimants to which it relates and supplies appropriate means for carrying out the purposes of section 19 of article XX. The foregoing application of tax laws of the state is peculiarly a matter of state concern. (*Chanler v. Kelsey*, 205 U.S. 466 [27 S.Ct. 550, 51 L.Ed. 882]; *Orr v. Gilman*, 183 U.S. 278 [22 S.Ct. 213, 46 L.Ed. 196]; 24 Cal. Jur. 434-435.)

We turn now to the question of the validity of the constitutional amendment and implementing legislation under guarantees of the federal Constitution. We approach this phase of the case in the light of the fact that section 19 of article XX prescribes no penal sanctions and in a governmental sense may be deemed merely a declaration of state policy with reference to its own tax structure. However, the plaintiff has taken the position that this constitutional provision is in reality an unlawful limitation on its constitutional rights which are protected by the federal Constitution. This question is extensively argued on behalf of the plaintiff.

It is claimed that section 19 of article XX imposes an unconstitutional condition on the right to a tax exemption in that it violates the First and Fourteenth Amendments of the federal Constitution which prohibit, among other things, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." (See *McCollum v. Board of Education*, 333 U.S. 203, 210 [68

S.Ct. 461, 92 L.Ed. 649, 2 A.L.R. 2d 1338]; *Cantwell v. Connecticut,* 310 U.S. 296 [60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352].)

Without the slightest doubt the First Amendment reflects the philosophy that church and state should be kept separate. (*Zorach v. Clauson* (1952), 343 U.S. 306, 312 [72 S.Ct. 679, 96 L.Ed. 954]; *Everson v. Board of Education,* 330 U.S. 1, 59 [67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392].) However, the First "Amendment embraces two concepts,—freedom to believe and freedom to act. The first is an absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . ." (*Cantwell v. Connecticut, supra,* 310 U.S. 296, 303-304; see also *United States v. Ballard,* 322 U.S. 78, 86 [64 S.Ct. 882, 88 L.Ed. 1148].) In the present case it is apparent that the limitation imposed by section 19 of article XX as a condition of exemption from taxation, is not a limitation on mere belief but is a limitation on action—the advocacy of certain proscribed conduct. What one may merely believe is not prohibited. It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion. (See *Gitlow v. New York,* 268 U.S. 652 [45 S.Ct. 625, 69 L.Ed. 1138]; *Leubuscher v. Commissioner of Int. Rev.,* 54 F.2d 998, 999.)

We are concerned then, not with the freedom to believe but with the limited freedom to act. The exercise of religious activity has long been recognized as subject to some limitation if that exercise is deemed detrimental to society. In *Reynolds v. United States,* 98 U.S. 145 [25 L.Ed. 244], the plaintiff was a church member and a conscientious practitioner of its established doctrine which encouraged polygamy. The Supreme Court in holding that such religious activity was subject to legislative limitations, stated at page

167 that to permit exceptions based on religious doctrine "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (See also *Cleveland v. United States,* 329 U.S. 14 [67 S.Ct. 13, 91 L.Ed. 12]; *Prince v. Massachusetts,* 321 U.S. 158 [64 S.Ct. 438, 88 L.Ed. 645].) There are decisions wherein statutory provisions having some effect on religious activity have been upheld on the ground that their effect was only incidental. In *Zorach v. Clauson* (1952), *supra,* 343 U.S. 306, the Supreme Court sustained the New York "released time" statutory provisions whereby public schools were permitted to release children for religious purposes during a part of the normal school day. Contentions were made to the effect that those provisions prohibited the "free exercise" of religion or were "respecting an establishment of religion" within the meaning of the First Amendment. The court concluded at pages 312-313 that the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would

be flouting the First Amendment. . . . We would have to press the concept of separation of Church and State to those extremes to condemn the present law on constitutional grounds."

In the present case there is nothing in the new enactments, either constitutional or statutory, which interferes with the free exercise of religion. The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption. Those tenets and doctrines are set forth in a document attached to the protest of the payment of its taxes and is made a part of the complaint. It announces to the world the plaintiff's high principles and purposes. The prohibited activity cannot, with any reason whatsoever, be consistent with or be tolerated by the religious doctrines there published and subscribed to by the plaintiff. As against a claim that such advocacy might be included within religious teaching, the Supreme Court has disposed of the contention. In *Murdock v. Pennsylvania*, 319 U.S. 105 [63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81], the court stated at page 109 that "we do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Reynolds v. United States*, 98 U.S. 145, 161-167 [25 L.Ed. 244], and *Davis v. Beason*, 133 U.S. 333 [10 S.Ct. 299, 33 L.Ed. 637] denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate." In *Davis v. Beason*, cited in the Murdock case, the court said of the advocacy of plural marriages: "To call their advocacy a tenet of religion is to offend the common sense of mankind. . . . The term 'religion' has refer-

ence to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of his obedience to His will. . . . It is assumed by counsel of the petitioner, that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth. . . . It does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion." As above noted the advocacy of the conduct prohibited has been made criminal by Congress (Smith Act, 54 Stat., part I, p. 670 [1940]), and through numerous statutory provisions by state legislatures it is well established that such advocacy is against local public policy. (See Levering Act, Stats. 1951 [3d Ex. Sess. 1950, ch. 7], p. 15.) In upholding the validity of the Levering Act this court in *Pockman v. Leonard,* 39 Cal. 2d 676 [249 P.2d 267], stated that the oath required there and similar in effect to the present one, was "obviously not a test of religious opinion."

It is further claimed by the plaintiff that section 32 imposes unconstitutional limitations upon the exercise of religion. As possibly affecting religion, section 32, in addition to the limitations imposed by the Constitution, requires the making of an oath. Since this oath is "obviously not a test of religious opinion" the plaintiff is not excused from making it any more than any other taxpayer. It appears that an oath was subscribed on behalf of the plaintiff by one of its officers when it filed its affidavit with the claim for exemption and its complaint in this action was also verified

on its behalf. If the making of the oath is objectionable to the plaintiff it must be for reasons relating to the content of the particular oath and not merely because it is an oath. This contention, therefore, may not be sustained.

It is also claimed that section 19 of article XX is a restriction on freedom of speech. The phrase "freedom of speech" is helpful in bringing to mind the concept which it means to convey, but as is often the case such a descriptive phrase assumes a literal meaning which causes difficulty and confusion in the development of the law surrounding it. Justice Holmes aptly stated that it "is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." (See *Hyde v. United States*, 225 U.S. 347, 390 [32 S.Ct. 793, 56 L.Ed. 1114, 1135]; see also Corwin, *Bowing Out "Clear and Present Danger,"* 27 Notre Dame Lawyer 325.)

Despite the fact that the First Amendment is cast in terms of the absolute it is not to be applied literally. There never has been an absolute right of free speech or an unqualified liberty to speak. "Speech" in the broad sense embodies all means of expression and communication. It is the primary vehicle by which individuals and organizations converse and transmit ideas, information and knowledge, and is deserving of the highest degree of protection and preservation. But there are other important interests of society which, at times, may conflict with the interest of individuals or groups in the exercise of this asserted freedom. In such circumstances the courts must declare when the individual or group does or does not have a right to speak freely, depending on a balance of the individual's right to speak out as against the harm or injury society may suffer as a result of such speech. The courts have been called upon to engage in this weighing process in many instances. Illustrative are those

which protect society from a breach of the peace (*Chaplinsky v. New Hampshire,* 315 U.S. 568 [62 S.Ct. 766, 86 L.Ed. 1031]), "loud and raucous" noises caused by sound trucks (*Kovacs v. Cooper,* 336 U.S. 77 [69 S.Ct. 448, 93 L.Ed. 513, 10 A.L.R. 2d 608]), interruption of the free flow of commerce (*American Communications Assn. v. Douds,* 339 U.S. 382 [70 S.Ct. 674, 94 L.Ed. 925]) and the like.

The standard by which the various interests have been balanced has, until recently, been the so-called "clear and present danger" test. It was heretofore declared that the right to free speech could be infringed upon only in situations where it appeared that the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" sought to be repressed. (*Schenck v. United States,* 249 U.S. 47, 52 [39 S.Ct. 247, 63 L.Ed. 470].) However, in *Dennis v. United States,* 341 U.S. 494 [71 S.Ct. 857, 95 L.Ed. 1137], the Supreme Court, reviewing its earlier decisions in this field, reconsidered the test in the light of existing and recognized realities and in conclusion stated: "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." By that statement of the test the standard by which a weighing of interests is to be made is clearly indicated.

The interest of the state in protecting its revenue raising program from subversive exploitation has already been considered. There are additional interests with which the state is concerned and which it is attempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces. This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well being and sphere of influence, those particular persons and groups of individuals who a[illegible] capable of formulating policies relating to good morals and respect for the law. It has been said that when church properties are exempted from taxation "it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws." (*County of Santa Clara v. Southern Pac. R. Co.*, 18 F. 385, 400 [9 Sawy. 165]; 24 Cal. Jur. 105.) The same may be said of others enjoying tax exemptions, notably veterans (art. XIII, § 1¼; *Allied Architects Assn. v. Payne*, 192 Cal. 431 [221 P. 209, 30 A.L.R. 1029]; *Veterans' Welfare Board v. Riley*, 188 Cal. 607, 611 [206 P. 631]), colleges (art. XIII, § 1a) and charitable organizations (art. XIII, § 1c) which, together with church groups, occupy positions whereby they may exert a salutory influence on the moral well-being of the community. Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities are doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. The propriety of that objective is recognized by the

Supreme Court in the Dennis case (*Dennis v. United States, supra,* 341 U.S. 494) where it said at page 509: "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

Obviously, a program of tax exemption designed to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat.

The test requires further that consideration be given not only to the "gravity of the 'evil'" sought to be repressed but that the evil be "discounted by its improbability." The Dennis case involved the validity of the Smith Act which prohibited and made criminal the advocacy of the activities denounced by the people of this state in its Constitution. In speaking of the imminence of the threat posed by the advocacy of subversive activities, the court at page 509 stated: "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. . . . Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." In that case the court upheld an instruction to the jury that if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would per-

mit, then as a "matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." In the present case the constitutional provision is concerned with those who advocate the same prohibited activity. It must be said that such advocacy from whatever source poses a threat to our government and that the gravity of the evil is not to be materially discounted by its improbability within the meaning of the test employed in the Dennis case.

Against the fundamental interest sought to be safeguarded by the state it is necessary to consider and balance the interest of those who assert that their right to speak has been unduly limited. From what has heretofore been said it is apparent that the limitation on speech is a conditional one, imposed only if a tax exemption is sought; that the prohibited advocacy is penal in nature, and that not one of the fundamental guarantees but only a privilege or bounty of the state is withheld if the exemption claimant prefers to engage in the prohibited criminal advocacy. It is obvious, therefore, that by no standard can the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one.

Apart from considerations involving the constitutional amendment the additional requirement of an oath imposed by section 32, of and by itself, gives no cause for the plaintiff to complain that it is improperly deprived of constitutional freedoms where compliance with the oath requirements otherwise may properly be imposed. (*Chesney v. Byram, supra*, 15 Cal. 2d 460, 465-468.)

Statutory limitations on the free exercise of speech similar in nature to the present limitation have been imposed as valid conditions upon which some privilege, benefit or conditional right has been withheld by a state. For example, as

a condition to obtaining or maintaining employment state employees have been required to subscribe to oaths which declare their nonadvocacy of subversive activities (*Pockman v. Leonard, supra*, 39 Cal. 2d 676); as have county employees (*Hirschman v. County of Los Angeles*, 39 Cal. 2d 698 [249 P.2d 287, 250 P.2d 145]; *Steiner v. Darby*, 88 Cal. App. 2d 481 [199 P.2d 429]), municipal employees (*Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 [71 S.Ct. 909, 95 L.Ed. 1317], affirming *Garner v. Board of Public Works*, 98 Cal. App. 2d 493 [220 P.2d 958]), public school teachers (*Adler v. Board of Education*, 342 U.S. 485 [72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R. 2d 472]; *Steinmetz v. California State Board of Education*, 44 Cal. 2d 816 [285 P.2d 617]; *Board of Education v. Eisenberg*, 129 Cal. App. 2d 732 [277 P.2d 943]; *Board of Education v. Wilkinson*, 125 Cal. App. 2d 100 [270 P.2d 82]), and candidates for public offices (*Gerende v. Baltimore etc. Board of Elections*, 341 U.S. 56 [71 S.Ct. 565, 95 L.Ed. 745]; *Shub v. Simpson*, 196 Md. 177 [76 A.2d 332]). The right to a bounty or other benefits from the state has been so conditioned in the case of applicants for state unemployment benefits. (*State v. Hamilton*, 92 Ohio App. 285 [110 N.E.2d 37]; *Dworken v. Collopy*, 91 N.E. 2d 564.) Even the right to vote (*Opinion of the Justices*, 252 Ala. 351 [40 So. 2d 849]), and to citizenship (*United States v. Schwimmer*, 279 U.S. 644 [49 S.Ct. 448, 73 L.Ed. 889]) has been so conditioned.

The plaintiff contends that the constitutional amendment and implementing legislation are invalid for other reasons based on constitutional guarantees. Such contentions are without merit in view of what has been said in disposing of the basic contentions presented.

Attention has been directed to the recent decision in *Pennsylvania v. Nelson*, 350 U.S. 497 [76 S.Ct. 477, 100 L.Ed. 640] (April 2, 1956), wherein the Supreme Court declared

invalid a Pennsylvania penal provision (Pa. Penal Code, § 207, 18 Purdon's Pa. Stat. Ann., § 4207) which made it a crime to advocate the violent overthrow of the federal or state government. Reasons for the decision in that case were that Congress had occupied the field to the exclusion of "parallel" state legislation; that the dominant interest of the federal government required that such "prosecutions" should be exclusively within the control of the federal government, and that the "Pennsylvania Statute presents a peculiar danger of interference with the federal program." It is clear from the opinion of the court in that case that the exclusion of state sedition legislation was limited to the imposition of criminal penalties. The court directed its attention to "antisedition statutes, criminal anarchy laws, criminal syndicalist laws, etc." No reference is made to the many so-called loyalty oath cases considered by the court in recent years. The court's intention not to change or modify the established law in those cases by what it said in the Nelson case appears from its later opinion in *Slochower v. Board of Education*, 350 U.S. 551 [76 S.Ct. 637, 100 L.Ed. 692], decided on April 9, 1956, one week after the court's decision in the Nelson case. In speaking of balancing the state's interest in the loyalty of certain persons against the interests of those persons in their individual rights, the court referred by way of illustration to its earlier decisions in *Adler v. Board of Education, supra*, 342 U.S. 485, and *Garner v. Board of Public Works of Los Angeles, supra*, 341 U.S. 716, 720. In both of those cases the court upheld the validity of state legislation which required, as a condition to acquiring or maintaining particular privileges or rights by certain persons, that such persons refrain from advocating the violent overthrow of our form of government. If in the present case the constitutional amendment and implement-

ing legislation infringe upon an area occupied exclusively by Congress within the scope of the decision in the Nelson case, certainly the same conclusion would be true of the enactments involved in the Garner and Adler cases and the court would not have approved those decisions in the Slochower case. Furthermore, in any consideration of the possible application of the Nelson case to the case at bar, it would be unreasonable to conclude that the federal government intends to or has occupied the field of state taxation.

Finally, it should be observed that we are here dealing with questions of law and not with any questions of fact with reference to the activities of the plaintiff organization. As hereinbefore noted, there is attached to the protest filed with the payment of the tax sought to be recovered a statement of the principles and objectives of the plaintiff in furtherance of its religious activities. Those principles and doctrines reflect the high ideals of morality and personal conduct which are basic in the foundation of our system of government, both state and national. They are noble in purpose and inspirational in tone. It is inconceivable that an organization actuated by the doctrinal pronouncements there declared would knowingly harbor within itself any person or group of persons who would engage in the subversive activities referred to in section 19 of article XX. It is taken for granted that an organization actuated by those high purposes and ideals would be the first to champion the efforts of the state to protect itself against the destruction of those guarantees which are necessary to the existence of the plaintiff and to the preservation of the fundamental rights which it otherwise enjoys. But an assumed fact of the nonexistence of subversion in an organization is not enough. The law demands the ascertainment of that fact for purposes of taxation and section 32 requires the cooperation of the plaintiff in establishing it.

No good reason has been advanced why churches as well as all of the many other organizations seeking exemption from taxation should not be required to comply with the law of the state providing for assistance to the county assessors in the discharge of their duties to ascertain the facts which would justify the exemption. By the plaintiff's failure and refusal to allege that it has complied with the law which would enable it to qualify for the exemption the complaint fails to state a cause of action. The demurrer was therefore properly sustained without leave to amend.

The judgment is affirmed.

SCHAUER, J., SPENCE, J., and MCCOMB, J., concurred.

TRAYNOR, J.—I dissent.

Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech. Section 19 in effect imposes a penalty in the form of withholding a tax exemption upon any person or organization that chooses to speak in a certain manner, namely, by advocating overthrow of the federal or state governments by force or support of a foreign government against the United States in event of hostilities. Section 32 provides a special method of enforcing these restrictions as to certain tax exemptions. A person claiming one of these exemptions must make a declaration that he does not advocate the conduct specified in section 19. In effect the provisions impose a tax measured by the exemptions allowed to others not only upon those who advocate overthrow of the government by force or support of a foreign government in event of hostilities, but also upon those who do not advocate such conduct but refuse to declare that they do not.

A restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather than directly through taxation, fine, or imprisonment. This court so held in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, 547-548 [171 P.2d 885], involving a comparable privilege, the use of school buildings for public meetings. "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. . . . The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who hold them, but granting it to those whose convictions and affiliations happen to be acceptable and in effect amplifying their privilege by making it a special one. In the competitive struggle of ideas for acceptance they would have a great strategic advantage in making themselves known and heard in a forum where the competition had been diminished by censorship, and their very freedom would intensify the suppression of those condemned to silence. It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of a democratic assembly would be stilled. And the dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas."

The tax exemptions in question are likewise comparable to the privilege of using the mails at less than cost. In *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 [66 S. Ct. 456, 90 L. Ed. 586], the court declared that, "grave constitutional questions are immediately raised once it is said that the use

of the mails is a privilege which may be extended or withheld on any grounds whatsoever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the [statute] . . . would have to be far more explict for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country." The dissent of Mr. Justice Brandeis in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U.S. 407, 430-431 [41 S.Ct. 352, 65 L.Ed. 704]. Invoked in the Esquire case, reasoned that, "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in *Ex parte Jackson* that 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.' (*Cummings v. Missouri,* 4 Wall. (U.S.) 277, 325 [18 L. Ed. 356].) The Government, might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and if would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to

one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression."

Although free speech may not be an absolute right, it must be jealously guarded. As the court stated in *American Communications Assn. v. Douds*, 339 U.S. 382, 412 [70 S.Ct. 674, 94 L.Ed. 925], the first amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom." That test is still a valid one. It was not repudiated in *Dennis v. United States*, 341 U.S. 494 [71 S.Ct. 857, 95 L.Ed. 1137]. The court was there concerned not to abolish the clear and present danger test but to bend it to the special situation of a critical time and the diabolic strategy of the Communist Party. As before, the key word in its solution was danger: "'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" (341 U.S. at 510.) There was evidence that the defendants, members of the Communist Party, advocated overthrow of the government by force and violence. The jury was instructed that it could not find them guilty under the statute unless it found that they had conspired with the intent that their advocacy "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction" of the government by force. The jury had also to determine whether the defendants intended to overthrow the government "as speedily as the circumstances would permit." Moreover, the court of appeals held that the record supported the conclusion that "the Communist Party is a highly disciplined organization, adept at

infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party. . . ." (341 U.S. at 498, 511-512.)

It is essential in each case to inquire into the character of the speech to be restrained and the surrounding circumstances. The probability that advocacy will break out in action depends on the numbers, methods, and organization of the advocates.

The state provisions in question penalize advocacy in a totally different context from that in the Dennis case. The penalty falls indiscriminately on all manner of advocacy, whether it be a call to action or mere theoretical prophecy that leaves the way open for counteradvocacy by others. Moreover, with regard to advocacy of support of a foreign government, the state provisions penalize not only advocacy during actual hostilities but also advocacy during peacetime of action during hostilities that may occur, if at all, in the remote future.

There is no evidence in the present case that plaintiff church or its members advocate the overthrow of the government by force or otherwise. There is no evidence that plaintiff church or any of the organizations seeking tax exemptions are infiltrated by Communists or other disloyal persons, or that they are in any danger of such infiltration. The evidence is all to the contrary. It is baldly assumed that plaintiff church advocates the overthrow of the government by force because it refuses to declare that it does not. It is one thing for a court to sustain convictions after it has concluded following a full trial that it is dealing with an

organization wielding the power of a centrally controlled international Communist movement; it is quite another to deprive a church of a tax exemption on the ground that it will not declare that it does not advocate overthrow of the government.

If it is unconstitutional to restrain plaintiff from advocating overthrow of the government, it is *a fortiori* unconstitutional to require it to prove or declare that it does not advocate overthrow of the government. (See *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, 548 [171 P.2d 885].) Such a restraint is the more vicious because it penalizes not only those who advocate overthrow of the government but also those who do not but will not declare that they do not. There are some who refuse to make the required declaration, not because they advocate overthrow of the government, but because they conscientiously believe that the state has no right to inquire into matters so intimately touching political belief. Rightly or wrongly they fear that such an inquiry is the first step in censorship of unpopular ideas. Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty. (See *Butler v. Michigan*, 25 U.S.L. Week 4165, 4166.)

The majority opinion, however, invokes the rule that the government may attain a legitimate objective through means reasonably related thereto even though there is an incidental restraint on speech. Thus, in securing qualified and trustworthy employees for government service a loyalty oath may be required, not for the purpose of restraining speech, but as a means of selection. (*Adler v. Board of Education*, 342 U.S. 485, 492 et seq. [72 S.Ct. 380, 96 L.Ed 517, 27 A.L.R. 2d 472]; *Garner v. Board of Public Works Los Angeles*, 341 U.S. 716,720 et seq. [71 S.Ct. 909, 95 L.Ed. 1317]; *Gerende v. Baltimore etc. Board of Elections*, 341

U.S. 56; *Steinmetz v. California State Bd. of Education*, 44 Cal. 2d 816; *Pockman v. Leonard*, 39 Cal. 2d 676 [249 P.2d 267].) Similarly, *American Communications Assn. v. Douds*, 339 U.S. 382 [70 S.Ct. 674, 94 L.Ed. 925] held that in seeking to keep interstate commerce free of political strikes, Congress may require labor officials to file non-Communist affidavits as a condition to their unions' invoking the jurisdiction of the National Labor Relations Board.

In such cases it is necessary to determine whether the provisions that incidentally restrain speech are in fact reasonably related to the attainment of the governmental objective. In *Lawson v. Housing Authority*, 270 Wis. 269 [70 N.W. 2d 605], cert. denied, 350 U.S. 882 [76 S.Ct. 135, 100 L.Ed. 778], the Supreme Court of Wisconsin considered a federal statute that provided in effect that no housing unit constructed under the statute could be occupied by a member of an organization designated as subversive by the attorney general. Pursuant to this statute, the Milwaukee Housing Authority adopted a resolution that required its tenants to execute a certificate of non-membership in the listed organizations. The court held the resolution unconstitutional, and after discussing the Douds case stated: "It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through communists in control of labor organizations disrupting commerce by calling strikes to carry out Communist Party policy. This court deems the possible harm which might result in suppressing the freedoms of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units

in federally aided housing projects." (270 Wis. at 287-288.) In considering the same problem, the Supreme Court of Illinois pointed out that, "The purpose of the Illinois Housing Authority Act is to eradicate slums and provide housing for persons of low-income class. [Citation.] It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose." (*Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319 [122 N.E. 2d 522, 526].)

In the present case the majority opinion thus states the governmental objective: "Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities . . . doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. . . . Obviously a program of tax exemption designated to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat."

The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking. Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly. In holding that school children may not be compelled to salute the flag as a condition to attending public schools, the Supreme Court through Mr. Justice Jackson

stated that, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641-642 [63 S. Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674].)

Advocacy does not occur in an intellectual vacuum. Usually it answers or challenges other advocacy. As Mr. Justice Frankfurter aptly stated in *Dennis v. United States*, 341 U.S. 494, 549-550 [71 S. Ct. 857, 95 L. Ed. 1137]: "Of course no government can recognize a 'right' of revolution, or a 'right' to incite revolution if the incitement has no other purpose or effect. But speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criti-

cism of defects in our society. Criticism is the spur to reform; and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. Astute observers have remarked that one of the characteristics of the American Republic is indifference to fundamental criticism. Bryce, The American Commonwealth, c. 84. It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellant the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas."

Section 32 impedes not only advocacy itself but discussion short of advocacy that may be of the utmost value. As Mr. Justice Jackson pointed out in the Dennis case, "Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation," and Mr. Justice Frankfurter recognized that, "there is no divining rod by which we may locate 'advocacy.' Exposition of ideas readily merges into advocacy." (341 U.S. at 545, 572.) Yet section 32 compels the cautious to forego discussion for fear they will overstep the line that no divining rod can locate.

Errors in thought or expression are best counteracted by deeper thought and more cogent expression. Only through free discussion can subversive doctrines be understood and

effectively combatted. "'The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies.' . . . In the last analysis it is on the validity of this faith that our national security is staked." (Mr. Justice Frankfurter concurring in *Dennis v. United States*, 341 U.S. 494, 550 [71 S.Ct. 857, 95 L.Ed. 1137].)

The majority opinion in the present case goes far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen's right to speak freely. Section 19 of article XX, implemented by section 32 of the Revenue and Taxation Code, arbitrarily assumes that those who seek tax exemptions advocate overthrow of the government unless they declare otherwise. The provisions infringe the right to engage in such advocacy without reference to its seriousness, inhibit free discussion short of advocacy, and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand in the face of the constitutional guarantees.

I would reverse the judgment.

GIBSON, C. J., concurred.

CARTER, J.—I dissent.

I approach the consideration of this case with a profound consciousness that the problems involved may have a direct

impact upon the stability of our state and federal governments. Evidently those who enacted the legislation here involved felt that it was necessary to preserve the status quo of those governments. On the other hand the plaintiff challenges the enactments as an invasion of fundamental constitutional guarantees to it and other religious institutions. We are, therefore, at the outset, faced with the problem as to what sanctions, in the way of pledges of fealty and loyalty, our government may exact from a taxpayer in order to qualify the latter for a tax exemption granted to all in the same class. The solution of this problem depends upon our interpretation and application of the constitutional guarantees relied upon by plaintiff as barriers against such sanctions.

It must be remembered that while our government was "conceived in liberty," it was born in revolution. The Declaration of Independence was the antithesis of a pledge of allegiance or loyalty to the British government of which the then American colonists were a part. This memorable document epitomized the concept of its framers of the objects and purposes of government and the right of the people to change it by force if necessary. It declared: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Pru-

dence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government."

The events which followed the adoption of the Decalaration of Independence by the Continental Congress on July 4, 1776, are well known to every student of American history. These events culminated in the Constitutional Convention at Philadelphia during the summer of 1787 where the Constitution of the United States was drafted. Many of the delegates af the Constitutional Convention had been members of the Continental Congress which had adopted the Decalaration of Independence. They were revolutionists in the truest and most dignified sense. It should be remembered that the Declaration of Independence and the Constitution of the United States were prepared by a group of men who had endured tyranny under a monarchial form of government for over three generations. They were the leaders in the struggle which overthrew that government and they sought to establish a government of the people, by the people, and for the people, which would derive its just powers from the consent of the governed. They sought to establish justice, ensure domestic tranquility, promote the general welfare, provide for the common defense and secure the blessings

of liberty to themselves and their posterity—a government which would govern without tyranny and without oppression and which would guarantee to the governed all of the liberty that a free people in a homogenous society could enjoy.

The great liberality accorded to the guarantees of freedom of speech and press by those at the head of our government during its formative period is exemplied by the following statement in the First Inaugural Address of President Thomas Jefferson. He there declared: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." This same concept was again expressed by Mr. Jefferson in his letter to Benjamin Rush in these words: "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man." This concept was more recently depicted by Mr. Justice Brandeis in *Whitney v. California,* 274 U.S. 357 [47 S.Ct. 641, 71 L.Ed. 1095], in words that will forever be a part of our American heritage. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from free speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may be fatal before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

Over a century and a half has elapsed since the above quoted utterances of Thomas Jefferson. Our government has withstood one major revolution and several minor armed rebellions but the fundamental basic concept of civil liberties embraced within the Bill of Rights has remained unimpaired.

It is worthy of note that the framers of the Constitution of the United States saw fit to exact of the person who assumed the office of President a very simple oath which reads as follows: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." (U.S. Const., art. II, § 1.) This is the only oath mentioned in the Constitution. Notwithstanding the great trust reposed in and power conferred upon the President of the United States by the Constitution and laws enacted by Congress, no other oath or pledge of loyalty may be exacted of him. Nevertheless no president has ever been suspected of disloyalty. It may be said with confidence that history has demonstrated the wisdom of the framers of the Constitution in drafting an oath so simple and yet so effective that it has endured the tests of time and trial. The past at least is secure. But such an oath was not deemed sufficient to insure the loyalty and fealty of the Vice President, members of Congress and other officials of our national government. Although no other official of our government possesses the power or authority of the President, they are required to take an oath much more exacting as it amounts to a pledge of allegiance. This oath is contained in an act of Congress and is as follows: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and alle-

giance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." (U.S. Code, title V, § 16, pp. 10-11, U.S.C. 1952 ed., titles 1-14.) I find no fault with this oath and recognize the propriety of exacting such an oath from one who assumes an official position with our government. It will be observed, however, that neither of the above quoted oaths has the slightest resemblance to the test oath here involved. In commenting on such an oath Dr. Carl Joachim Friedrich, Professor of Government, of Harvard University had the following to say: "It is depressing to realize that the oath has always cropped up as a political device when the political order was crumbling. In the period of religious dissensions the oath of allegiance made its appearance in England as an instrument of intolerance and, a little later, of royal oppression. James Stuart, the tiresome pedant on the throne, sought refuge in an oath required of all ministers and the like (most teaching then being religious). At that time the imperial pretensions of the 'reformed' papacy, the right of the Pope claimed by the Jesuits to absolve the subjects of an heretical king from their allegiance, made the king desirous of testing the loyalty of his more influential subjects. Yet not many years later his son's head rolled into the sand.

"Following that, Oliver Cromwell in his desperate efforts to find a legitimate basis for his dictatorial regime, demanded an oath preceding the election of parliament in 1653 that no one participating in the election would allow the constitution 'as settled in one person and parliament' to be disturbed. But Cromwell died and the oath was forgotten. The rupture which the oath was supposed to heal did not disappear until toleration and a liberal, truly constitutional

government had taught people how Catholic and Protestant, how parliamentarian and authoritarian, how Whig and Tory could live peaceably together, with no one requiring the other to swear oaths which were either unnecessary or ineffectual.

"And where have oaths appeared in our own day? In Fascist Italy and in Nazi Germany. In both of these countries the dictators have promulgated requirements according to which the teachers and professors have to swear an oath of allegiance to the Duce, the Leader. But what, one may ask, was the object of demanding such a declaration from men who every day were obliged to mold their words and their teachings to the Fascist creed? The purpose was to humiliate or to destroy them. There were plenty of men who were known to the students as non-Fascists, non-Nazis. If they could be forced into swearing their allegiance to the official creed, they were morally discredited, they were shown to be trimmers. What is more, the man of integrity and of faith is the really dangerous enemy. He would not consent. He would protest. Gaetano Salvemini, now teaching at Harvard, is such a man. He knew the game of Mussolini and he left." (Article entitled "Teacher's Oaths," published in the January, 1936 issue of Harper's, vol. 172, at p. 171.)

At this point, I cannot refrain from quoting the words of warning contained in the powerful concurring opinion of Mr. Justice Black in *Wieman v. Updegraff*, 344 U.S. 183, 192 [73 S.Ct. 215, 97 L.Ed. 216]: "History indicates that individual liberty is intermittently subjected to extraordinary perils. . . . The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about

government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today, however, few people and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. *When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.* Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

". . . Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. *We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.* And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost." (Emphasis added.)

History is replete with accounts of the many stratagems created by tyrants to violate the individual's liberty. But it is also replete with accounts of man's constant warfare

against these devices and victories won by courageous judges, legislators, administrators, lawyers, and citizens.

In 1787, the founders of this nation assumed that they had settled these matters for all time when they drew upon the lessons of history and wrote a Bill of Rights to assure the individual permanent freedom from official tyranny, and the right freely to participate in the process of self-government.

"Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." (Learned Hand, J., in *United States v. Kirschenblatt* (C.C.A.2d), 16 F.2d 202, 203, 51 A.L.R. 416.)

"These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. . . . 'Upon this point a page of history is worth a volume of logic.' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 [41 S.Ct. 506, 65 L.Ed. 963, 16 A.L.R. 660]." (Frankfurter, J., *United States v. Lovett* (1945), 328 U.S. 303, 321, 323 [66 S.Ct. 1073, 90 L.Ed. 1252].)

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U.S. 616 [6 S.Ct. 524, 29 L.Ed. 746], in *Weeks v. United States*, 232 U.S. 383 [34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B 834], and in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 [40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426]) have declared the importance to

political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property;' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties to the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers." (*Gouled v. United States* (1920), 255 U.S. 298, 303 [41 S.Ct. 261, 65 L.Ed. 647], Clarke, J.) (Emphasis supplied.) See also: Brandeis, J. dissenting, *Olmstead v. United States* (1927), 277 U.S. 438, 476, 478 [48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376], and *Jones v. Securities & Exch. Com.* (1935), 298 U.S. 1, 28 [56 S.Ct. 654, 80 L.Ed. 1015].

"If there is one fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess* by word or act their faith therein." (Jackson, J., in *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 642 [63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674].) (Emphasis supplied.)

The story of the rise and fall of the *oath ex-officio* needs to be retold. It will be recalled that the early 1200's were marked by the adoption of this procedural device in the

ecclesiastical courts. In this period the inquisitional oath began to take the place of the trial by compurgation oaths in the ecclesiastical courts. The compurgation trials conducted with the device of "oath helpers" had become little better than a farce. The new method of the *oath ex-officio* was one which pledged the accused to answer truly and was followed by a rational process of judicial probing by questions on the specific details of the affair. In a footnote by John H. Wigmore in 15 Harvard Law Review 615, it is stated that by the middle of the 13th century "the new oath became the customary instrument in the papal inquisition of heresy; which, indeed, owed its effectiveness largely to the new methods."

Liberals in the church courts insisted that the oath could only be imposed if the court had a rational hypothesis for proceeding against the suspect. Such rational hypothesis could either be *fama publica* or *clamosa insinnatio*. However, this was too mild for those who wanted a more vigorous pursuit of heretics and schismatics, and they finally prevailed in establishing the doctrine that the oath could be imposed by the church official *ex-officio* without any antecedent foundation. This extreme position, however, directly resulted in the downfall of the power of the ecclesiastical courts because of the public indignation it aroused.

The ordinary course of trial by the Inquisition was this. A man would be reported to the inquisitor as of ill-repute for heresy, or his name would occur in the confessions of some other prisoners. A secret inquisition would be made and all accessible evidence against him would be collected. When the mass of surmises and gossip, exaggerated and distorted by the natural fear of the witnesses, eager to save themselves from the suspicion of favoring heretics, grew sufficient for action, the blow would fall. The accused was

then prejudged. He was assumed to be guilty, or he would not have been put on trial, and virtually his only mode of escape was by confessing the charges against him, abjuring heresy, and accepting whatever punishment might be imposed on him in the shape of penance. Persistent denial of guilt and assertion of orthodoxy, when there was evidence against him, rendered him an impenitent, obstinate heretic, to be abandoned to the secular arm and consigned to the state. (See Henry Charles Lea, A History of the Inquisition of the Middle Ages, I, p. 407.)

However, the English people early registered their resistance to general inquisitorial methods and their attendant abuses. A statute passed in 1360 in the reign of Edward III, provided, "that all general inquiries before this time granted within any seignories, for the mischiefs and oppression which have been done to the people by such inquiries, shall utterly cease and be repealed." (34 Edw. III, ch. 1.)

But in 1583 the Court of High Commission in Causes Ecclesiastical, under the leadership of Archbishop Whitgift, started a crusade against heresy wherever it could be found, examining suspected persons under oath in most extreme *ex-officio* style.

In 1609 Sir Edward Coke, as Chief Justice of Common Pleas, granted prohibition against the High Court of Ecclesiastical Causes in *Edward's* case. (13 Rep. 9.) Edward had been charged with libel and the church court put him under the *ex-officio* oath to compel him to state his meaning of the libelous words he was accused of uttering. The common law court took jurisdiction away from the church court upon the ground, among others, that "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intentions or thought of his heart; and if any man should be examined upon his oath of the

opinion he holdeth concerning any point of religion, he is not bound to answer the same."

But the oath *ex-officio* persisted and the Court of the Star Chamber began during James' reign to use the *ex-officio* oath in stamping out sedition. Here the common law courts were powerless to prevent employment of the oath procedure because they lacked jurisdiction over the Court of the Star Chamber.

In 1639 the Court of the Star Chamber examined John Lilburn, "Freeborn John," an opponent of the Stuarts, on a charge of printing or importing certain heretical and seditious books. Lilburn refused to answer questions "concerning other men, to insnare me, and to get further matter against me." The Council of the Star Chamber condemned him to be whipped and pilloried for his "boldness *in refusing to take a legal oath,*" without which many offenses might go "undiscovered and unpunished." (See 3 How. State Trials 1315, et seq.)

The whip that lashed "Freeborn John" smashed the Court of the Star Chamber as well. In July, 1641, Parliament abolished the Court of the Star Chamber, the Court of High Commission for Ecclesiastical Causes, and provided by statute that no ecclesiastical court could thereafter administer an *ex-officio* oath on penal matters. In 1645 the House of Lords set aside Lilburn's sentence and in 1648 Lilburn was granted £3000 reparation for the whipping which he had received.

Meanwhile, the scene of struggle against oaths *ex-officio* was carried to colonial America. The story is well told by R. Carter Pittman in 21 Virginia Law Rev. 763 from which the following quotations are taken:

"The settlement of the English colonials in the new world took place at a time in English History when opposition to

the *ex-officio* oath of the ecclesiastical courts was most pronounced, and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. . . . The *ex-officio* oath, as employed in the ecclesiastical courts, which regulated the most intimate details of men's daily life, and more particularly by the Court of High Commission, was possibly the most hated instrument employed to create the unhappy plight of these Puritans and Separatists. . . .

"About getting out of England there was much 'red tape' and it consisted in the most part of taking oaths—the oath of Supremacy and the oath of Allegiance, etc. For days and weeks thousands waited aboard ship in the river Thames until *this oath ordeal was over* and after that they were forced with a refined cruelty to say the prayers in the Anglican prayer books twice a day at sea. . . ."

The trial of Mrs. Ann Hutchinson before Governor Winthrop of Massachusetts in the year 1627 was recalled by Mr. Justice Black in *Adamson v. California,* 332 U.S. 46 [67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223], when he commented at page 88:

"Mrs. Hutchinson was tried, if trial it can be called, for holding unorthodox religious views. People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be rightfully respected. As a result of her trial and *compelled admissions,* Mrs. Hutchinson was found guilty of *unorthodoxy* and banished from Massachusetts. The lamentable experience of Mrs. Hutchinson and others, contributed to the over-whelming sentiment that demanded adoption of the *Constitutional Bill of Rights.* The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo.

They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and *all public officers of a power to compel people to testify against themselves.*" (Emphasis supplied.)

But the ingenuity of those who would use the oath against the unorthodox was undaunted.

See *Harrison v. Evans*, 1 English Reports, 1437, decided by the House of Lords in 1767. Evans was a Protestant Dissenter and this fact was known to the Lord Mayor of London. Nevertheless, the Mayor appointed Evans to fill a vacancy as sheriff, despite the existence of an act providing that no person should be admitted to any office who had not, within the twelve preceding months, "received the sacrament of the Lord's Supper according to the rites of the Church of England." Because of this statute Evans could not take the oath of office or assume it, and he was assessed for a statutory penalty of £600 which was made applicable to any citizen who refused to assume an office after being appointed thereto.

The House of Lords, by a 6 to 1 vote, ruled with the dissenting Evans, overturned the judgments of the lower courts and returned to him his £600.

"*Test oaths, designed to impose civil disabilities* upon men for their beliefs rather than for unlawful conduct were an abomination to the founders of this nation. This feeling was made manifest in Article VI of the Constitution which provides that *no religious test shall ever be required as a qualification to any office or public trust under the United States.*"

(Black J., dissenting *In re Summers* (1945), 325 U.S. 561, 576 [65 S.Ct. 1307, 89 L.Ed. 1795].) (Emphasis supplied.)

"No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and

petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, *that the religious test oath* or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." (Emphasis supplied.) (*Bridges v. California* (1941), 314 U.S. 252 at 265 [62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346].)

It is revealing to note that test oaths and the struggle against them arose at a time when the division between church and state was in its early stages, when the separation was far from complete. The immunity from compulsory disclosure which ultimately developed affected not only the right of the individual to worship as he pleased but also his right, notwithstanding his place or mode of worship, to hold political office. The protection accorded religious belief developed hand in hand with nonsectarianism in government.

This policy has been recognized in the United States. While the original purpose behind the abolition of the test oath may have been to further religious liberty, the effect has been to extend political liberty. The following statement is illustrative: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. *Cf. Pierce v. Society of Sisters,* 268 U.S. 510 [45 S.Ct. 571, 69 L.Ed. 1070]. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." (*Thomas v. Collins,* 323 U.S. 516, 531 [65 S.Ct. 315, 89 L.Ed. 430].)

The California 1897 Direct Primary Act permitted political parties to require persons, as a condition of voting at the primary, to give an oath that they would thereafter support the nominees of that party. That statute was declared unconstitutional and the Supreme Court, in *Spier v. Baker* (1898), 120 Cal. 370, said at page 379 [52 P. 659, 41 L.R.A. 196]: ". . . And the moment you recognize the existence of power in the legislature to create tests in these primary elections, you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in the protective tariff. If such a power may be sustained under the constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature."

In *Thomas v. Collins,* 323 U.S. 516 [65 S.Ct. 315, 89 L.Ed. 430], the same thought is expressed: "But it cannot be the duty, because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. *In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.*" (Emphasis supplied.)

In the light of the foregoing discussion, let us consider the attacks made by plaintiff upon the oath here required. It

is contended, with merit, that the oath here is unconstitutional in that it violates the equal protection clauses of both the federal and state Constitutions and that it also violates the First Amendment to the Constitution of the United States. Section 32 makes an exception insofar as the householder's $100 exemption on personal property is concerned. While it cannot be denied that the Legislature in its wisdom may classify in order that certain evils may be avoided in the future, such classification must bear a reasonable relation to the evil to be avoided. There is here no reasonable classification when the evil to be avoided is considered. There is no evidence that any of the churches or veterans here involved advocated, or intended to advocate, the forbidden political philosophy. The constitutional amendment and section 32 appear to be a sort of shotgun attempt on the part of the Legislature to hit an undefined object. In other words, there is no relation between the object to be achieved and the tactics taken to achieve it. A statement made in the majority opinion clearly shows the fallacy in the entire affair. That statement reads as follows: "By its enactment [section 19 of article XX] the people of this state declared the public policy of withholding from the owners of property in this state *who engage in the prohibited activities* the benefits of tax exemption. The denounced activities are criminal offenses under federal and state laws. They are prohibited by the act of Congress known as the Smith Act (54 Stat. 670) and by our state law (Stats. 1919, p. 281)." It should be emphatically stated and understood that not one of the churches or veterans here involved has been so much as accused of subversive activities. But through their refusal to take the unconstitutional (as I believe) oath, they are penalized in advance for something they have not done and will, in all probability, never

do. By the majority opinion we are informed that the reason for the oath is to protect state revenues from impairment by those who would seek to destroy it by unlawful means. An entirely different situation would be presented had any of those involved sought to destroy the state, but here only future ***highly problematical*** activity is forsworn although the tax is levied for past ownership of property to which the exemption was applicable. Just why charitable institutions are singled out as presenting the greatest danger to this country in time of peace or war is not made clear in the majority opinion. It is Hornbook law that legislation classifying certain groups for corrective purposes must bear a reasonable relationship to the object to be achieved. Churches would, indeed, seem to me to be the least likely subjects of classification for legislative measures to correct the evil thought to exist. Veterans, also, are those who have risked their lives or have been willing to risk them to uphold the ideals for which this country stands. The exemptions were granted, in the first instance, so that religious work might be carried on with the least amount of tax burden possible to the end that the money saved thereby might be used to promote the general welfare; in the second instance, to veterans because they gave up homes, families and positions to promote the general welfare insofar as protecting this country from an enemy was concerned. It hardly seems logical to assume that laws removing the tax exemptions from those dedicated to the promotion of the general welfare because they *might,* in the future, decide to do a turn-about-face and *destroy* the general welfare can be said to be a reasonable classification. If there is one principle that has always (heretofore) been clearly understood in this country it is that every person is presumed innocent until proven guilty beyond a reasonable doubt. The legisla-

tion involved here presumes that one refusing to sign the oath has been, or will soon be, guilty of treasonable conduct. From what is said in the majority opinion it appears that this thought did occur to the members of the court signing it. We are informed that there is a presumption of innocence *but* that the assessor, because of it, is not relieved from making the investigation enjoined on him by law; that his administrative determination is not binding on the tax exemption claimant "but it is sufficient to authorize him to tax the property as non-exempt and *to place the burden on the claimant to test the validity of his administrative determination in a court of law.*" What is this but forcing the supposedly subversive organization or person to prove *itself* or *himself* innocent beyond a reasonable doubt?

In testing the reasonableness of the laws under attack here, the next question which presents itself is why are householders excepted from those who must take the oath before any tax exemption is allowed them? We are told that the "segment of householders in this state is so overwhelmingly large as compared with others chosen for exemption that the cost of processing them would justify their separate classification." If this class is so "overwhelmingly large" it would appear that if the old adage "in numbers lie strength" is true, that this class should also be required to take the oath prior to claiming the exemption. It would also appear that mere difficulty in "processing" would be of little moment in an undertaking thought to be so vitally necessary. Furthermore, if the principle behind the oath is, as we are told, to prevent those dangerous persons from depleting the state's revenues, it would appear that this "overwhelmingly large" class might, even though the exemption is a relatively small one, deplete it even more than the revenues from those which fall within the legislation. The Supreme Court of the

United States said (*Louisville Gas & E. Co. v. Coleman*, 277 U.S. 32, 37 [48 S.Ct. 423, 72 L.Ed. 770]) that "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U.S. 321, 337 [6 S.Ct. 57, 29 L.Ed. 414]; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293 [18 S.Ct. 594, 42 L.Ed. 1037], and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara v. Southern Pac. R. Co.*, 18 F. 385, 388-399 [9 Sawy. 165]; *The Railroad Tax Cases*, 13 F. 722, 733 [8 Sawy. 238]. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [40 S.Ct. 560, 64 L.Ed. 989]; *Air-way etc. Corp. v. Day*, 266 U.S. 71, 85 [45 S. Ct. 12, 69 L.Ed. 169]; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240 [46 S.Ct. 260, 70 L.Ed. 557, 43 A.L.R. 1224]. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be

made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155 [17 S.Ct. 255, 41 L.Ed. 666]."

There is in my mind no doubt whatsoever that the legislation with which we are here concerned bears no relation whatsoever to the objective to be achieved. Presumably that objective is to stamp out, by any means at hand, the promulgation of unpopular ideas. While the idea of the overthrow of the government of this country by force and violence in either peace or war is as abhorrent to me as it is to the majority of Americans, I am at a complete loss when it comes to imagining any reasonable theory on which the legislation in question can be considered an effective way of preventing such action. The tax itself is on property owned by churches and used for religious purposes and the exemption applies only when such property is used for such purposes. So far as the veteran's exemption is concerned, the tax to which it applies is also on property. Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and to bear no reasonable relationship one to the other. The classification here involved falls directly within the rule of the Louisville Gas case: it is arbitrary, it does not rest upon a difference bearing a reasonable and just relation to the act in respect to which the classification is proposed; it is a *mere* difference which "is not enough."

THE OATH IS A VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF SPEECH:

In *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal.2d 536, 542 [171 P.2d 885], we held that "Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Four-

teenth Amendment against infringement by state Legislatures. (*Thomas v. Collins*, 323 U.S. 516, 530 [65 S.Ct. 315, 89 L.Ed. 430]; *De Jonge v. Oregon*, 299 U.S. 353, 364 [57 S.Ct. 255, 81 L.Ed. 278].) *However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present 'no clear and present danger that they will bring about the substantive evils' that the Legislature has a right to prevent.* 'It is a question of proximity and degree.' (*Schenck v. United States*, 249 U.S. 47, 52 [39 S.Ct. 247, 63 L.Ed. 470].) The United States Supreme Court has been alive to the difference between remote dangers and substantial ones, between remote dangers and immediate ones . . . '. . . Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," Brandeis, J., concurring in *Whitney v. California*, *supra*, 274 U.S. at page 374; it must be "serious," *id.* 274 U.S. at page 376. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. . . .'" (*Bridges v. California*, 314 U.S. 252, 261, quoting from the concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 374 [47 S.Ct. 641, 71 L.Ed. 1095].)

A reading of the majority opinion leaves in the minds of the reader the implication that the "clear and present danger" rule was abrogated by the later case of *Dennis v. United States*, 341 U.S. 494 [71 S.Ct. 857, 95 L.Ed. 1137]. In the Dennis case it was specifically noted by the court that in the Smith Act "Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas

without fear of governmental sanction. Rather Congress was concerned with the very kind of activity *in which the evidence showed these petitioners engaged.*" It will be recalled that we have here *no evidence* that the churches and veterans involved were even so much as accused of the forbidden activities. In the Dennis case the petitioners had been found guilty by a jury of organizing a Communist party in the United States; in knowingly and wilfully teaching and advocating the overthrow of our government by force and violence. The court also held that it had been determined that the evidence amply supported the necessary finding of the jury that the petitioners "were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared." In the majority opinion in the Dennis case it was said that "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech" and speaking of the "clear and present danger" rule it was said "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. *If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.*" (Emphasis added.) The court expressly rejected the contention that success or probability of success in overthrowing the government was the criterion. The court then, in speaking of prior cases, said that the court had not been "confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of

world crisis after crisis." The Supreme Court then stated the rule, relied upon by the majority here, that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This rule, following the court's language concerning what constituted a "clear and present" danger and read in the light of the facts as they were stated in the Dennis case, shows the absurdity of this tempest-in-a-teapot with which we are here confronted: there is no showing that the churches and veterans were highly organized into a war-like machine dedicated to the overthrow of the government by force and violence with leaders highly trained and ready to give the "word" when the time was ripe for revolution! The objects of the legislation, the objective and the means used to achieve it are completely unrelated. Where is the "danger" so far as churches and veterans are concerned? And does the denial of a charitable exemption constitute a reasonable attempt to save this country from revolution? Or does the oath involved just constitute an unconstitutional invasion of freedom of speech? In my opinion it constitutes an unconstitutional invasion of freedom of speech with the absurdity of the entire situation pinpointed by the thought that any embryo revolutionist would surely not hesitate to subscribe to such an oath.

As Mr. Justice Douglas said in his dissenting opinion in the Dennis case, "Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilization apart.

"Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have

counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

"There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

"Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed."

Mr. Justice Douglas said that "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity

and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial." The books on Leninism and Communism, etc., which were involved in the Dennis case were commented on by Mr. Justice Douglas as follows: "Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon." Mr. Justice Douglas then continued: "The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion [Mr. Justice Jackson], which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. . . . I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme."

I repeat that in the case at bar we haven't even had speech let alone any facts. Neither prejudice nor hate nor senseless fear should be the basis for abridging freedom of speech.

"Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent."

American democracy is no accident; it is the majestic product of a vigorous, experimental and passionate history. This nation came into existence as the result of a purposeful struggle against governmental tyranny. The heritage of Thomas Jefferson—"Rebellion to Tyrants is obedience to God"—remains with us, embodied in our institutions and traditions. The spirit of Inquisition, which was abjured in the Declaration of Independence, has always been obnoxious to our political and social life. Equally, it has found no tolerance in our legal codes, our legal traditions, our juridical morality. Due process has meant a fair, legal process. Liberty has meant genuine, concrete liberty for the individual citizen—his right to freedom from search and seizure, his right to privacy, his right to be free of persecutory inquisition on grounds of race, color, creed, political opinion or association.

At this truly grave moment in our nation's growth it is in the power of this court to speak forthrightly in the language of Coke, Camden, and Bradley, in the language of the many illustrious jurists for whom the frenzy of the political market place never blurred the meaning of freedom.

"Under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. . . . No higher duty, nor more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the

benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." (*Chambers v. Florida* (1940), 309 U.S. 227, 241 [60 S.Ct. 472, 84 L.Ed. 716].)

What is required at this moment of this court is not innovation, but rather a restatement of the growing principles by which the history of the western world has given dignity to its citizens: "Historical liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price." (Cardozo, J., *Matter of Doyle,* 257 N.Y. 244, 268 [177 N.E. 489].)

The issue is momentous, of far-reaching implication, and the ruling of the court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time. "Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the 'Report Upon the Illegal Practices of the United States Department of Justice,' which aroused the public concern of Chief Justice Hughes (then at the bar), and by the little book entitled 'The Deportations Delirium of Nineteen-Twenty' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor." (Frankfurter, J., dissenting, *Harris v. United States* (1947), 331 U.S. 145, 173 [67 S.Ct. 1098, 91 L.Ed. 1399].)

Devotion to Americanism often calls for something other than conformity. The plaintiff in the present case knew that to protect the Constitution, indeed merely to invoke its pro-

tection for all Americans, required courage, and that hardihood to challenge a wrong done under color of authority was as indispensable to good citizenship as would be, in other circumstances, unquestioning obedience. President Thomas Jefferson wrote to Benjamin Rush in a letter dated April 21, 1803: "It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. *It behooves him, too, in his own case to give no example of concession, betraying the common right of independent opinion, by answering questions of faith* which the laws have left between God and himself." (Emphasis supplied.)

In the last analysis, when the moment of decision comes, to the private citizen as well as to the judge, it is in the quiet of his own mind and in the glow of his own courage that Americanism thrives. And it is in the cumulative decision of millions, citizen as well as official, that Americanism is reborn each moment.

For the foregoing reasons, I would reverse the judgment.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term — 1957

No. _____

FIRST METHODIST CHURCH OF SAN LEANDRO, a California Corporation,

Appellant,

vs.

RUSSELL C. HORSTMANN, as Assessor of the County of Alameda, State of California; COUNTY OF ALAMEDA, CALIFORNIA; CITY OF SAN LEANDRO, CALIFORNIA; and EDWIN MEESE, JR., as Tax Collector of the County of Alameda,

Appellees.

FIRST UNITARIAN CHURCH OF BERKELEY, a California Corporation,

Appellant,

vs.

RUSSELL C. HORSTMANN, as Assessor of the County of Alameda, State of California; EDWIN MEESE, JR., as Tax Collector of the County of Alameda; COUNTY OF ALAMEDA; JAMES H. BRIGGS, as Assessor of the City of Berkeley, State of California; FRED A. BIRD, as Tax Collector of the City of Berkeley; and CITY OF BERKELEY,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS

Appellees move, pursuant to Rule 16(1) Revised Rules of the Supreme Court of the United States, that

the appeal from the final judgment of the Supreme Court of the State of California be dismissed for want of jurisdiction on the ground that the appeal does not present a substantial Federal question.

OPINIONS BELOW

The Opinion of the Supreme Court of California (Jur. St., App. A) is reported at 48 A.C. 470, 311 P. (2d) 542.

JURISDICTION

The judgment of the Supreme Court of California was entered April 24, 1957. Notice of Appeal was filed on May 27, 1957, and an enlargement of time until September 24, 1957, was granted by the Chief Justice of this court and filed therewith July 10, 1957. The jurisdiction of this court is sought to be invoked under U.S.C. Title 28, Section 1257(2).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED

1. Whether the State of California may affix as a condition of the enjoyment of a tax exemption privilege the requirement that the applicant subscribe to a loyalty declaration, without violating the First and Fourteenth Amendments of the Federal Constitution and Article I, Section 9, Clause 3 of the Federal Constitution?

2. Whether such requirement constitutes an incursion by the state into a field preempted by the Fed-

eral government thus rendering said requirement unconstitutional?

STATEMENT

The manner in which these consolidated cases arose in the courts below is set forth in the majority Opinion of the Supreme Court of the State of California found in Appendix A in the Jurisdictional Statement of the Appellant. This statement of facts is adopted by the Appellees herein as correct and are by reference made a part of this Motion to Dismiss.

ARGUMENT

INTRODUCTION

Appellants list some seven questions as the basis for reversal of the decision of the California Supreme Court. (Jur. St., pp. 4-6.) In an attempt to demonstrate that, as presented here, none of the problems raised by appellants presents a substantial Federal question, respondents will undertake a seriatim treatment.

I. NEITHER ARTICLE XX, SECTION 19 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, NOR SECTION 32 OF THE REVENUE AND TAXATION CODE OF THAT STATE REPRESENT AN UNCONSTITUTIONAL INFRINGEMENT ON THE FIRST AMENDMENT RIGHTS MADE APPLICABLE TO THE STATE BY THE FOURTEENTH AMENDMENT.

It is elementary that neither freedom of speech nor freedom of religion are absolutes. No matter how much we revere these ideals and no matter how clearly we recognize the indispensable role they have played

in making our nation great, we must further recognize that they are subject to limitation. *Dennis* v. *U. S.*, 341 U.S. 494, 503; *American Communications Association* v. *Douds*, 339 U.S. 382, 394: *Breard* v. *Alexandria*, 341 U.S. 622, 642; *Reynolds* v. *U. S.*, 98 U.S. 145; *Cleveland* v. *U. S.*, 329 U.S. 14; *Prince* v. *Mass.*, 321 U.S. 158. The present case is a clear example of the type, where the effect on speech and religion, if any at all, is so slight, so indirect, so insubstantial, that it is far outweighed by the right of the State of California to attach as a condition for receipt of a property tax exemption the Loyalty declaration set forth in Section 32 of the Revenue and Taxation Code.

It should perhaps be emphasized that tax exemptions are offered to organizations such as appellants herein because such institutions are regarded as establishments to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. *County of Santa Clara* v. *Southern Pacific*, 18 Fed. 385, 400. Neither of the attacked sections asks appellants nor commands appellants to say, think or believe anything that they do not wish for whatever reason, or more particularly, for reasons of conscience. They do, however, ask for that minimum proof of loyalty, upon which the tax exemption is justified, before the state is free to extend its bounty. This is not a free speech, religion or assembly question. It deals merely with the right of the state to assure itself that a tax exemption applicant meets the qualifications set forth by the people of the state, and such a question is a matter of state concern. *Chanler* v. *Kelsey*, 205 U.S. 466; *Orr* v. *Gilman*, 183 U.S. 278.

In addition, this court has, in previous decisions in related fields put to rest the question of whether a state may impose conditions upon the enjoyment of certain privileges without running afoul of the First and Fourteenth Amendments. *Garner* v. *Public Works of Los Angeles*, 341 U.S. 716; *Adler* v. *Board of Education*, 342 U.S. 485; *Gerende* v. *Baltimore, et cetera Board of Elections*, 341 U.S. 56; *U. S.* v. *Schwimmer*, 279 U.S. 644; *In re Summers*, 325 U.S. 561.

Further, this court has also laid to rest appellants' argument that they may, by the mere assertion of conscience, conviction or belief, render the state powerless to regulate conduct in violation of social duty or subversive of good order. (Jur. St., pp. 9-11.) *Reynolds* v. *U. S.*, 98 U.S. 145; *Stansbury* v. *Marks*, 2 Dall. 213; *Prince* v. *Mass.*, 321 U.S. 158; *Cleveland* v. *U. S.*, 329 U.S. 14.

Appellants also argue that the questioned sections must fall since the language used is vague and uncertain. (Jur. St., p. 5.) It should be emphasized at the outset that imagination can no doubt conjure up hypothetical cases in which the meaning of the terms used will be in question. However, as this court has stated, "(T)he applicable standard . . . is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important." *American Communications Association* v. *Douds*, 339 U.S. 382, 412; *Dennis* v. *U. S.*, 341 U.S. 494, 515-516.

Language similar to that used in the questioned enactments has been approved. *Whitney* v. *California*, 274 U.S. 357, 368; *Lockhart* v. *U. S.*, 264 Fed. 14, Cert. den. 254 U.S. 645; *Wimmer* v. *U. S.*, 264 Fed. 14, Cert. den. 253 U.S. 494; *Samuels* v. *United Seamen's Service, Inc.*, 165 Fed. (2d) 409, 411-412. Such language does not require that appellants have "prophetic" understanding of its meaning. The oath is narrowly drawn, the language used in the context of its use is clear and precise; the standard easily ascertainable. It is only when one adopts the scholastical approach of indulging in excessive subtlety and petty pedantism that the clarity of Article XX, Section 19 and Sections 32 is questioned.

One other comment should be made. At page 17 of appellants' Jurisdictional Statement the statement is made that the questioned enactments are "void for vagueness in being insufficiently precise and clear in stating what a person is forbidden to say." It should be pointed out that no one, least of all appellants, are forbidden from saying, thinking or doing anything by Article XX, Section 19 or Section 32. What the sections do require, however, is that an applicant for a tax exemption, clearly a matter within the plenary power of the state, establish his or its eligibility.

II. THE ATTACKED ENACTMENTS MERELY CONDITION THE ENJOYMENT OF A PRIVILEGE ON PROPER QUALIFICATION BY THE APPLICANT; THEY ARE IN NO SENSE BILLS OF ATTAINDER.

In question 2 (Jur. St., p. 5) appellants raise a great many questions which seem particularly mis-

directed in view of the nature of the enactments here involved. The church tax exemption provided by the State of California is irrefutably a privilege and the applicant is required to come forward and affirmatively show his qualification to receive the exemption. Indeed, the burden is on the taxpayer to demonstrate his qualification for exemption. *Pacific Home* v. *County of Los Angeles*, 41 Cal. (2d) 844, 849; *Cedars of Lebanon Hospital* v. *County of Los Angeles*, 35 Cal. (2d) 729, 734. The requirement of Section 32 does no more than add an additional requisite basic to qualification. Quite obviously any person or organization which subscribes to the oath will be presumed to have done so honestly. The burden of proving perjury for false swearing remains, as it always has, on the People of the State of California. All the rights of which appellants speak will be available to them at that time. Until such time as the question of false swearing arises, there is no criminal proceeding, there is simply and solely the question of qualification to receive a tax exemption.

Appellants' Bill of Attainder argument is equally specious, since the facts of the instant case fall squarely within this court's reasoning in *American Communications Association* v. *Douds*, 339 U.S. 382, where the court said at page 413:

> "Those cases, and this also, according to the arguments involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: In the previous decisions the individu-

> als involved were in fact being punished for past acts; whereas in this case they are subject to possible loss of position only because there is substantial grounds for the congressional judgment that their belief and loyalty would be transformed into future conduct . . .
>
> "This distinction is emphasized by the fact that members of those groups identified in Section 9h are free to serve as Union officers if at any time they renounce the allegiance which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in Section 9h, is not a bar to resumption of the position. In the cases relied upon by the unions, on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See *U. S.* v. *Lovett* (supra) at page 314; *Cummings* v. *Missouri* (supra) at page 327 . . . We cannot conclude that this section is a bill of attainder."

The oath required by Section 32 does not inflict punishment without judicial trial for a past act. The requirement of Section 32 is that there be present loyalty—a condition of past disloyalty does not represent a bar to the exemption.

In addition, before there can be a Bill of Attainder there must be punishment "for the past act." Historically, of course, the punishment imposed by the most

dreaded Bill of Attainder was death. Less severe punishments were imposed by so-called Bills of Pains and Penalties. As stated in *Garner* v. *Los Angeles Board, et al.*, 341 U.S. 716 at page 722:

> "Bills of attainder are 'legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . .' (Citations omitted.) Punishment is prerequisite . . ."

Involved in the *Garner* case was legislative action curtailing a privilege previously enjoyed. This Court did not consider this punishment. Clearly, punishment presupposes an offense. Here we have no offense of which the appellants are deemed guilty. All that has happened is that a privilege previously enjoyed is withheld because of failure to subscribe to the oath.

III. APPELLANTS' UNCONSTITUTIONAL CONDITION ARGUMENT IS FALLACIOUS IN ABSENCE OF A SHOWING THAT THE PROSCRIPTIONS OF THE ATTACKED SECTIONS RENDER THEM INVALID.

The contention that Article XX, Section 19 and Section 32 impose an unconstitutional condition upon the enjoyment of the privilege of tax exemption is fallacious inasmuch as it presupposes the existence of a constitutional right to overthrow the government by force or violence. (Jur. St., p. 5.)

In the past the doctrine of unconstitutional conditions has had its principal application in inter-state

commerce. *Terral* v. *Burke Construction Co.*, 257 U.S. 259; *Western Union Telegraph Company* v. *Kansas*, 216 U.S. 1; *Frost Trucking Company* v. *Railroad Commission*, 271 U.S. 583. In these situations it was clear that the privilege extended was conditioned on the giving up of an unquestioned constitutional right.

However, the doctrine of unconstitutional conditions is inapplicable in the instant case. Appellants' theory appears to be that their right of free speech and political activity is unconstitutionally interfered with as a condition of receiving the tax exemption. However, this argument assumes as a fact that there is a constitutional right to advocate the overthrow of the government by force or violence. That there is no such right has been demonstrated by this court in other contexts (*Dennis* v. *U. S.*, 341 U.S. 494; *Whitney* v. *California*, 274 U.S. 357); and in the instant context depends on the answer to appellants' question I. (Jur. St., p. 4.) As we noted, there is no question of any infringement on First Amendment rights by the attacked enactments. This being so there can be no question of an unconstitutional condition.

IV. THERE IS NO VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY THE QUESTIONED SECTIONS.

The fourth point raised by appellants (Jur. St., p. 5) is especially esoteric, and thus a difficult one of which to dispose. Perhaps the best answer is to repeat the obvious fact that while California's tax exemptions are offered on a class basis, that is, churches, veterans,

etc., they are offered to all within a particular class on the identical terms and conditions.

On the other hand, this might be a mere reiteration of the argument in the court below to the effect that the classification into declarants and non-declarants, that is, those who will subscribe to the oath and those who will not, is discriminatory as to appellants because they fall into the latter category. This type of sophistry hardly deserves a reply, but perhaps it would not be amiss to point out that classification of an obviously less desirable nature was sustained in *Terrace* v. *Thompson*, 263 U.S. 197, where this court upheld State legislation which denied the right to own property to aliens who would not declare their intention to become citizens, even though some of the latter group because of ancestry were ineligible for citizenship.

V. THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT RAISES NO QUESTION IN CONNECTION WITH THIS LITIGATION.

The fifth point raised by appellants (Jur. St., p. 5) contains little, if any, discussion, and again, for that reason, is difficult to deal with. However, it is well recognized that the privileges and immunities provision of the Fourteenth Amendment protects "all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship." *Hague* v. *C.I.O.*, 307 U.S. 496; *In re Slaughter House* cases, 83 U.S. 36, 16 Wall. 36. The privilege of tax exemption is one which the state within constitutional limits is free to

extend or deny on such conditions as it sees fit. *Madden v. Kentucky*, 309 U.S. 83. There are no cases which as yet would include within the compass of the privileges or immunities clause this plenary right of the state over taxation.

VI. THE APPLICATION OF SECTION 32 OF THE REVENUE AND TAXATION CODE TO ONLY THOSE WHO SEEK PROPERTY TAX EXEMPTIONS DOES NOT RENDER IT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

As stated by the California Supreme Court (Jur. St., App. A, pp. 10-11), Article XX, Section 19, contains no exceptions, and it is the duty of the local assessors, regardless of statutory implementation such as Section 32, to extend exemptions only to those taxpayers who meet *all* the qualifications of the particular exemption sought.

With the above in mind, the attack by appellants on Section 32 is placed in proper perspective. Section 32 clearly applies to all exemption claimants to which it relates and in this connection supplies appropriate means for carrying out the purposes of Section 19 of Article XX. The equal protection clause "means that the rights of all persons must rest upon the same rule under similar circumstances . . . and that it applies to the exercise of all powers of the state which can affect the individual or his property, including the power of taxation . . . it does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification must

be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced, shall be treated alike. . . . That is to say, mere difference is not enough: the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." *Louisville Gas Company* v. *Coleman*, 277 U.S. 32, 37; accord *Walters* v. *St. Louis*, 347 U.S. 231, 237.

The legislature has not attempted, by Section 32, to limit the application of the constitutional mandate of Article XX, Section 19. The legislature could not, by the enactment of Section 32, limit the requirement, that in order to receive any tax exemption, the applicant must not advocate the overthrow of the government by force or violence. In following the mandate of Article XX, Section 19, that it pass all laws necessary to carry out the provisions of the article, the legislature was merely following a classification procedure that it had previously established. In order to obtain certain exemptions, Revenue and Taxation Code Sections 251-261 require that an affidavit or claim be filed. Such affidavits are required to claim the veterans, church, orphanage, college and welfare exemptions. No procedure is specified and no affidavit is required to obtain the exemptions for public libraries and museums, growing crops, public schools, state, county or city property, U. S. exempt property, cemeteries, bonds,

vessels, householders and trees and vines. These exemptions which do not have to be claimed by affidavit are self executing.

If, as appellants argue, Section 32 is unconstitutional in requiring an oath to obtain certain property tax exemptions and not others, then by the same reasoning, Revenue and Taxation Code Sections 251-261 would be invalid in setting up a procedure, including the requirement of affidavits to claim certain exemptions where the same procedure is not required to claim other exemptions. But that such result does not obtain in California is assured by the *First Methodist Episcopal Church* v. *County of Los Angeles*, 204 Cal. 201, 204-205.

It must be remembered that basically Section 32 is an evidentiary provision. It acts as a means of obtaining the necessary information for the assessor to make his determination that taxpayers are not entitled to certain property tax exemptions. However, where the constitution authorizes the legislature to "enact such laws as may be necessary to enforce the provisions of this section" there is no constitutional requirement that the same method of enforcement be used as to all taxes or that the legislature provide all the laws necessary to enforce the constitutional provision at once. It could be subsequently determined that an oath should be required in claiming other tax exemptions or it could set up some other method of obtaining evidence as to whether applicants for tax exemptions advocate the overthrow of the government

by force or violence. As this Court has itself held, the legislature is at liberty to select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489.

VII. THIS COURT'S RECENT "PRE-EMPTION" CASE OF PENNSYLVANIA VS. NELSON DID NOT THE SLIGHTEST VIOLENCE TO THE RIGHT OF CIVIL REGULATION, THE PROBLEM HERE INVOLVED.

Appellants' reliance on the case of *Pennsylvania* v. *Nelson*, 350 U.S. 497, is unjustified when the true holding of the case is examined. (Jur. St., pp. 17-18.) The direct question presented to this Court in the *Nelson* case was whether the Smith Act (18 U.S.C. Section 2385) which prohibits a knowing advocacy of the overthrowing of the government of the United States by force and violence superseded the enforcibility of the Pennsylvania Sedition Act which proscribed the same conduct. Clearly, the Court was concerned with *penal* laws and in concluding that the federal government pre-empted the sedition field as far as *penal* laws were concerned did no violence whatsoever to the right of civil regulation by the states, the problem here involved. Clearly this is true when it is recognized that a scant few weeks after the *Nelson* decision this Court in *Schlockower* v. *Board of Higher Education in the City of New York*, 350 U.S. 55, affirmed its prior decision in *Adler* v. *Board of Education*, 342 U.S. 45, and *Garner* v. *Board of Public Works*, 341 U.S. 716.

CONCLUSION

WHEREFORE, the motion to dismiss the appeal should be granted.

Respectfully submitted,

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